Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

79-1713

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

RED LAKE BAND OF CHIPPEWA INDIANS,

Petitioner,

vs.

STATE OF MINNESOTA AND COUNTIES OF ROSEAU, PENNINGTON, MARSHALL, RED LAKE, POLK, CLEARWATER, BELTRAMI, LAKE OF THE WOODS AND KOOCHICHING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT

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IN THE

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RED LAKE BAND OF CHIPPEWA INDIANS,

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VS.

STATE OF MINNESOTA AND COUNTIES OF ROSEAU, PENNINGTON, MARSHALL, RED LAKE, POLK, CLEARWATER, BELTRAMI, LAKE OF THE WOODS AND KOOCHICHING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT

The Red Lake Band of Chippewa Indians, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on January 31, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, on appeal from the United States District Court of Minnesota, is reprinted as Appendix A hereto, infra, page

A-1. The decision is as yet unreported. The opinion of the United States District Court for Minnesota is reported in 446 F.Supp. 1382 and is reprinted as Appendix B hereto, infra, page A-3.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit (Appendix A), was entered on January 31, 1980, no rehearing was sought and no extension of time to petition for certiorari were sought. The jurisdiction of the Court is envoked under Title 28, USC 1254.

QUESTIONS PRESENTED

Did the Nelson Act of January 14, 1889, 25 Stat. 642, and the Act of February 20, 1904, 33 Stat. 46, terminate the reservation rights of the members of the Red Lake Band of Chippewa Indians to hunt, fish, trap and gather wild rice, so that the State of Minnesota now has jurisdiction to enforce its hunting, fishing, trapping and wild rice gathering laws against enrolled members of the Red Lake Band of Chippewa Indians on non-Indian owned lands within the Red Lake Indian Reservation boundaries as those boundaries were established as a result of the treaty of October 2, 1863, 13 Stat. 667, and which thereafter and on January 14, 1889, was known and recognized as the Red Lake Indian Reservation.

STATUTE INVOLVED

1. Act of Congress dated January 14, 1889, 25 Stat. 642, entitled "An Act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota," the pertinent text of which appears in Appendix C, infra page A-14.

2. Act of Congress dated February 20, 1904, 33 Stat. 46, the pertinent text of which appears in Appendix D, infra page A-24.

3. The Treaty of October 2, 1863, 13 Stat. 667, II Kappler 853 the pertinent text of which appears in Appendix E, infra page A-34.

STATEMENT OF CASE

The basis for federal jurisdiction in the court of first instance is pursuant to 28 USC 1345, inasmuch as the proceedings were commenced by the United States of America on its own behalf and in behalf of the Red Lake Band of Chippewa Indians. The judgment of the United States District Court for Minnesota reprinted as Appendix B held that the Red Lake Band does not retain hunting, fishing, trapping, or wild ricing rights in the areas ceded in 1889 and 1904. The United States of America perfected an appeal of that judgment to the United States Court of Appeals for the Eighth Circuit. By Order of the United States Court of Appeals, Eighth Circuit, filed August 21, 1979, the United States was permitted to withdraw as Appellant and the Red Lake Band of Chippewa Indians was substituted as Appellant. The Court of Appeals, Eighth Circuit, affirmed the judgment of the District Court, reprinted as Appendix A.

The action was commenced against the State of Minnesota for declaratory and injunctive relief that the members of the Red Lake Band of Chippewa Indians have the right to hunt, fish, trap and gather wild rice on presently non-Indian owned lands but which lands were Indian owned and were a part of the Red Lake Indian Reservation in 1863, free of the State of Minnesota regulation.

The Chippewa Indians which constituted one of the larger Indian tribes in the northerly part of the United States occupying at the time of the origination of the United States a large area reaching from Lake Huron on the east to beyond Lake Superior on the west, through the present states of Michigan, Wisconsin, Minnesota and eastern Dakota. The United States dealt with the Chippewas in early treaties as a single tribe. In later treaties they

were regarded as divided into distinct bands; and particular bands - some instances a single band and in others a limited plurality of bands - were recognized as occupying separate areas in Michigan, Wisconsin, Minnesota and eastern Dakota, and as entitled to hold or cede the same independently of other bands and the Chippewa as a whole.

One of these bands was the Red Lake Band which was recognized as the owners of the Red Lake Reservation as it existed following the treaty of October 2, 1863, 13 Stat. 667, *Chippewa Indians of Minnesota* v. *United States,* 301 U.S. 358, 360-361, 373, 57 S.Ct. 826, 81 L.Ed. 1156 (1937); *United States* v. *White,* 508 F.2d 453, 456 (C.A. 8, 1974). After the 1863 treaty the Red Lake Reservation encompassed an area of approximately 3.2 million acres, all in northwestern Minnesota (District Court decision Summary of Facts, 466 Fed. Supp. 1383 (App. B).) In *United States* v. *White,* supra, the Court held the members of the Red Lake Band had the right to hunt and fish on the Red Lake Reservation and to affect these rights it was incumbent upon Congress to expressly abrogate or modify them, 508 F.2d 453, 457.

By the Act of January 14, 1889, 25 Stat. 642 (App. C) entitled "An Act for the Relief and Civilization of the Chippewa Indians in the State of Minnesota," Congress proposed to all bands of Chippewa Indians in Minnesota a plan for their relief and civilization through allotments of their land in severalty, and sale of their lands not required for allotments, placing the proceeds of sales, less various expenses, in a permanent interest bearing fund, using the interest and principal of the fund for the benefit, support and education of the Indians, and ultimately distributing per capita the principal of the fund. The act created a commission to negotiate with the different bands of Chippewa Indians in Minnesota for a complete cession to the United States of their title and right to all of each reservation, "except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission

is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the commissioners for said purposes." *Chippewa Indians of Minnesota* v. *United States,* supra, 301 U.S. 362.

As soon as the agreements were approved the lands to be sold were to be surveyed, and pine lands identified and appraised with particular regard to quantity and quality of pine. All other lands not classified as pine lands were classified as "agricultural lands" (1889 Act - Section 4). The pine lands were to be sold by the United States at public auction for cash at not less than their appraised value in forty acre parcels (1889 Act - Sections 4 and 5). The "agricultural lands" were to be disposed of by the United States to actual settlers under the homestead law at $1.25 an acre, to be paid in five equal installments (Act. of 1889 - Section 6).

All money accruing from the disposed of said lands, after deducting enumerated expenses incurred pursuant to the act, was to be placed in the Treasury of the United States to the credit of the Chippewa Indians as a permanent interest bearing fund for a period of fifty years. The interest was to be used for the support and education of such Indians, and at the end of fifty years the permanent fund was to be divided and paid per capita. Limited appropriations could be made from the principal sum by Congress, for the purpose of promoting civilization and self-support among the Indians (Act of 1889 - Section 7).

The Commission created under the 1889 Act conducted separate negotiations with each of the bands of the Chippewas of Minnesota, which resulted in separate, but identical, agreements in respect to the lands to be sold, *Chippewa Indians* v. *United States,* 80 C.Cls. 410, 439-441 (1935). The pertinent parts of the agreement with the Red Lake Band stated as follows: (H.R. Exec. Doc. No. 247, 51st Cong., Stipulated Exhibit D, pp. 27-28)

"We, the undersigned, being male adult Indians over eighteen years of age, of the tribes or bands of Chippewa Indians occupying and belonging to the Red Lake Reservation, in the State of Minnesota, do hereby certify and declare that we have heard read, interpreted, and thoroughly explained to our understanding, the act of Congress approved January 14, 1889, entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota" (Public No. 13), which said act is embodied in the foregoing instrument, and after such explanation and understanding, have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act, and each and all of the provisions thereof, and do hereby grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to all and so much of said Red Lake Reservation as is not embraced in the following described boundaries, to-wit:" (land description)

". . . for the purposes and upon the terms stated in said Act, which said lands embraced within the foregoing boundaries have been reserved by the Commissioners appointed under said Act and as therein authorized for the purpose of making and filling allotments therein provided for."

The pertinent parts of the agreement with the White Earth Reservation Indians provided as follows: (H.R. Exec. Doc. No. 247, 51st Cong., Stipulated Exhibit D, pp. 34-37)

"We the undersigned, being male adult Indians over eighteen years of age of the tribes and bands of Chippewa Indians occupying and belonging to the White Earth Reservation, in the State of Minnesota, do hereby certify and declare that we have heard read, interpreted, and thoroughly explained to our understanding the act of Congress approved January 14, 1889, of which the following is a copy, to-wit:"

(copy of 1889 Act)

"And after such explanation and understanding have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act, and each and all of the provisions thereof, and do hereby grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to all and so much of said White Earth Reservation as is not embraced in the following described boundaries, to-wit:

Townships 141 and 142, of range 37; townships 141, 142, 143, 144, 145 and 146, of range 38; townships 141, 142, 143, 144, 145, and 146, of range 39; townships 141, 142, 143, 144, 145, and 146, of range 40; townships 141, 142, 143, 144, 145, and 146, of range 41; and townships 141, 142, 143, 144, 145, and 146, of range 42, for the purposes and upon the terms stated in said act, which said lands, embraced within said boundaries have been reserved by the Commissioners appointed under said Act and as therein authorized, for the purpose of making and filling the allotments therein provided for; and we do also hereby grant, cede, and relinquish to the United States, for the purposes and upon the terms stated in said Act, all our right, title, and interest in and to the lands reserved by us and described in the first Article (ending with the words "to place of beginning") of the treaty with the Chippewas of the Mississippi, proclaimed April 18, 1867, (16 Stat. p. 719), and also to the Executive addition thereto made and described in an executive order dated October 29, 1873; and we do also hereby cede and relinquish to the United States all our right, title, and interest in and to all and so much of the Red Lake Reservation as is not required and reserved under the provisions of said Act, to make and fill the allotments to the Red Lake Indians in quantity and manner as therein provided."

The pertinent parts of the agreement with the Leech Lake Reservation Indians provided as follows: (H.R. Exec. Doc. No. 247, 51st Cong., Stipulated Exhibit D, p. 49)

> "We, the undersigned, being male adult Indians over eighteen years of age of the Pillager and Lake Winibigoshish bands of Chippewa Indians, residing upon the Leech Lake, Lake Winibigoshish, and Cass Lake Reservations, in the State of Minnesota, do hereby certify and declare that we have heard read, interpreted, and thoroughly explained to our understanding, the act of Congress, approved January 14, 1889, entitled 'An act for the relief and civilization of the Chippewa Indians in the State of Minnesota' (Public No. 13), which said act is embodied in the foregoing instrument, and after such explanation and understanding have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act, and each and all of the provisions thereof, and do hereby grant, cede, relinquish and convey to the United States, for the purposes and upon the terms stated in said act, all our right, title, and interest in and to the lands reserved and set apart for the Pillager and Lake Winibigoshish bands by the treaty of February 22, 1855, (10 Stat., p. 1165), and particularly described in an Executive order dated November 4, 1873, as follows, to wit:" (land description)
>
> ". . . . and also to the two separate tracts reserved and set apart for the said Pillager and Lake Winibigoshish bands by the second Article of said treaty, and as therein described, and also to the Executive addition thereto made and described in an Executive order dated May 26, 1874; and we do also hereby cede and relinquish to the United States all our right, title, and interest in and to so much of the Red Lake Reservation as is not required and reserved under the provisions of said Act, to make and fill the

allotments to the Red Lake Indians in quantity and manner as therein provided."

The same issue that is presented in this appeal was before the Minnesota Supreme Court in respect to the White Earth Reservation Indians in the recent case, decided since the District Court decision in this case, of *State of Minnesota* v. *Bernard Clark, et al.,* 282 N.W.2d 902 (Minn. 1979), appeal dismissed U.S., (1980). The Minnesota Supreme Court held in the *Clark* case, supra, that the Nelson Act of 1889 "did not disestablish the White Earth Reservation, and that consequently, all lands within its exterior boundaries are 'Indian country' as defined by 18 U.S.C.A. 1151" (p. 907) and, therefore, the state did not acquire jurisdiction by the Nelson Act of 1889 to enforce its game and fish laws against enrolled members of the White Earth Band on non-Indian owned lands within the White Earth Reservation as established by the treaty of 1867, 16 Stat. 719.

The same issue that is presented in this appeal was before the United States District Court in *Leech Lake Band of Chippewa Indians* v. *Herbst,* 334 F.Supp. 1001 (D. Minn. 1971) and *State of Minnesota* v. *Forge,* 262 N.W.2d 341 (Minn. 1977), appeal dismissed, 435, U.S. 919, 98 S.Ct. 1479, 55 L.Ed.2d 512 (1978), in respect to the Leech Lake Reservation Indians, and both courts held that the Nelson Act of 1889 did not disestablish the Leech Lake Reservation as it existed prior to the 1889 act or terminate the right of the Indians to hunt, fish, trap and gather wild rice free of State of Minnesota regulations on non-Indian-owned lands within the Leech Lake Reservation boundaries as it existed following the treaty of 1855, 10 Stat. 1165.

By the Act of February 20, 1904, c. 161, 33 Stat. 46, 48, III Kappler pp. 28-33, Congress modified and adopted an agreement negotiated by a United States Indian inspector with the Red Lake Indians, whereby an additional 256, 152 acres of the Red Lake Reservation was conveyed in trust to the United States to be sold. The act specifically states that it is not a sale of

the land to the United States, but that the intention of the act was that the United States shall act as trustee for the Indians to dispose of the lands and that nothing in the agreement shall be construed to deprive the Indians belonging on the Red Lake Indian Reservation, of any benefits to which they were entitled under existing treaties or agreements. The specific provisions are quoted as follows:

Article V of the 1904 Act

> "ART. V. It is understood that nothing in this agreement shall be construed to deprive the said Indians belonging on the Red Lake Indian Reservation, Minnesota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this agreement. It is the intention of this agreement that the United States shall act as trustee for said Indians to dispose of said land and to expend and pay over the proceeds as received from the sale thereof only as received, as herein provided."

Article VII, Section 4 of the 1904 Act

> "SEC. 4. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received as herein provided."

Extensive findings in respect to the treaty rights of the Red Lake Band, congressional history of the act of January 14, 1889, negotiations and agreements made under the 1889 Act, agreement approved by the 1904 Act, subsequent Federal recognition of the Red Lake Indians rights and conclusions are detailed in *Chippewa Indians of Minnesota* v. *United States, et*

al., 80 Ct. Cls. 410-488 (1935), which findings were summarized by the United States, Supreme Court and affirmed on appeal *Chippewa Indians of Minnesota* v. *United States, et al.*, 301 U.S. 358 (1936).

By Order of Restoration dated February 22, 1945, as appearing in the Federal Register, March 2, 1945, title to lands not sold by the United States under the 1889 Act were ordered restored by departmental action to tribal ownership pursuant to the 1934 Indian Reorganization Act, 48 Stat. 984 (Pl. Ex. 61 and 62, District Court Decision, 466 Fed. Supp. 1384, App. B).

REASONS FOR ALLOWING THE WRIT

As pointed out in the statement of the case, the Act of 1889 created a commission and that commission was charged with the responsibility of negotiating with all the different bands of Chippewa Indians of Minnesota for the allotment and sale of part of their reservation lands. As a result of the negotiation sessions, written agreements were made with the different bands of Chippewa Indians in Minnesota with regard to the Indian lands that were to be sold. Identical written agreements were reached with the various bands of Chippewa Indians in Minnesota.

A review on a writ of certiorari should be granted because of the conflicting Federal and State court decisions on the same issue of Indian hunting and fishing rights in Minnesota. The Supreme Court of the State of Minnesota, *State of Minnesota* v. *Forge*, 262 N.W.2d 341 (Minn. 1977), appeal dismissed 435 U.S. 919, 98 S.Ct. 1479, 55 L.ed.2d 512 (1978) and the United States District Court for Minnesota, *Leech Lake Band of Chippewa Indians* v. *Herbst*, 334 F.Supp. 1001 (D. Minn. 1971), have each held that with respect to the Leech Lake Reservation Indians that the Nelson Act of 1889 and written agreement entered into pursuant thereto did not disestablish the Leech Lake Reservation or terminate the Indians rights to hunt and fish within the original boundaries of the Leech Lake Reservation.

The Minnesota Supreme Court, *State of Minnesota* v. *Clark, et al.*, 282 N.W.2d 902 (Minn. 1979), made the same decision, with respect to the hunting and fishing rights of the White Earth Reservation Indians, that the Nelson Act of 1889 and written agreement entered into pursuant to the Act did not disestablish the White Earth Reservation. Yet, the United States Court of Appeals for the Eighth Circuit holds that with respect to the Red Lake Reservation Indians, those hunting and fishing rights do not exist even though the same act of Congress and identical written agreements are applicable to the three Chippewa Bands involved in the cases. The Supreme Court should grant this review in order that the Nelson Act of 1889 be applied in the same manner to the Red Lake Band of Chippewa Indians Reservation as it has been applied to the Leech Lake Reservation and White Earth Reservation.

The petition for writ of certiorari should further be granted since the Court of Appeals, for the Eighth Circuit, in adapting the District Court of Minnesota's decision in this matter has decided a federal question in a way which is in conflict with applicable decisions of the United States Supreme Court. The decisions of the Supreme Court on the issue of diminishment and termination of an Indian reservation by agreement and Act of Congress have in determining the intent of the Indians and Congress, been based on the factual findings that the Indians had entered into an agreement to diminish their Reservation boundaries by the sale of their lands to the United States for a sum certain and the combination of such agreement and the process leading up to the Congressional Acts ratifying or acting on the Agreement reflected a tribal and congressional intent to diminish the reservation boundaries. *DeCoteau* v. *District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). In *DeCoteau* v. *District Court,* an 1889 Agreement was made with the Indians, providing for a sum certain payment, which agreement was ratified by the Act

of March 3, 1981, 26 Stat. 1035, and resulted in diminution of the Reservation boundaries.

In *Rosebud Sioux Case,* a 1901 Agreement was made with the Indians providing for a sum certain payment, which agreement if ratified would have resulted in a diminution of the Reservation boundaries. Although Congress did not ratify the 1901 agreement because of concern over the responsibility for payment, it acted upon the 1901 agreement by adoption of the Act of April 23, 1904, 33 Stat. 254, which incorporated the language of the 1901 agreement except for a modification changing the lump sum payment to provide for a sum certain payment for Sections 16 and 36 (school sections) and the sale of the remaining lands to settlers by the Government as trustee with payment of the proceeds to the Indians as the lands were actually settled (430 U.S. 595-597). This Court determined "that the 1904 Act carried forth the intent to disestablish which was unquestionably manifested in the 1901 Agreement," (430 U.S. p. 605) and stated "there is nothing in the change of method of payment . . . which indicates that the clear intent of the 1901 agreement to diminish the Reservation boundaries had changed between 1901 and 1904. (430 U.S. p. 598)

The Court of Appeals failed to distinguish the aforementioned cases from the Red Lake situation. The 1889 Act of Congress and Agreement between the Red Lake Indians and the United States Government did not provide for payment from the government to the Indians of a sum certain amount of money for the lands that were ceded in trust for the purpose of sale. The cession of the Red Lake Reservation lands was not to the United States absolutely, but in trust. The 1889 agreement pursuant thereto was merely an opening up of designated lands for settlement by non-Indians. If the lands were not sold by the Government, the Indians would have received nothing, and the Government would have continued to hold the lands in trust for the Indians.

The Indians and Congressional intent of an absolute sale to the United States which this Court found in the *DeCoteau* and *Rosebud* cases, supra, is lacking in respect to the Red Lake Reservation cession in trust to the United States. In 1902 in *Minnesota* v. *Hitchcock,* 185 U.S. 373 (1902) this Court in respect to the cession of the Red Lake Reservation lands under the 1889 Act and Agreement held (pp. 394-395) "The cession was not to the United States absolutely, but in trust. It was a cession of all of the unallotted lands. The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the Treasury of the United States to the credit of the Indians, such sum to draw interest at five per cent, and one fourth of the interest to be devoted exclusively to the maintenance of free schools among the Indians and for their benefit."

The failure of the District Court and Court of Appeals to apply the determinations of the Supreme Court in respect to the purpose and intent of the 1889 Act and Red Lake Reservation Agreement as stated in *Minnesota* v. *Hitchcock,* supra, and the distinction of the factual findings in *DeCoteau* and *Rosebud* cases, supra, has resulted in a decision which is in conflict with the decisions of this Court, which this Court should correct on a review by certiorari.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Dated April 21, 1980.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

For the Eighth Circuit

No. 79-1420

Red Lake Band of Chippewa Indians,

Appellant,

v.

State of Minnesota, et al., Appellees.

Appeal from the United States District Court for the District of Minnesota

Submitted: January 15, 1980

Filed: January 31, 1980

Before ROSS and HENLEY, Circuit Judges, and PORTER, District Judge.*

PER CURIAM.

The Red Lake Band of Chippewa Indians appeals from the decision of the district court[1] in which its claims of hunting, fishing, trapping, and wild rice gathering rights in approximately 2.6 million acres of land in the state of Minnesota were denied.

This dispute arises out of the circumstances surrounding the Band's cession of two parcels of land to the federal government

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* The Honorable Donald J. Porter, United States District Judge for the District of South Dakota, sitting by designation.

[1] The United States District Court for the District of Minnesota, the Honorable Edward J. Devitt, Chief Judge.

in 1889 and 1904,[2] and specifically whether any of the above-mentioned rights in the land were retained. Since the time the land was ceded to the government, the state of Minnesota has exercised full jurisdiction over Indians in the territory, including the regular enforcement of state gaming laws against members of the Red Lake Band. The Band seeks now to free its members of the state's control, by contending that its grant of rights, title and interest in the land to the United States did not include hunting, fishing, trapping and wild rice gathering rights. We disagree.

We have reviewed the applicable case law, the briefs of the parties and the record before us on appeal. We agree with the district court's conclusion that the Red Lake Band gave up its rights to hunt, fish, trap and gather wild rice free of the state's regulation of such activities. We would like also to point out that our disposition of this case in no way conflicts with our recent decision in *United States* v. *Dupris,* No. 78-1575 (8th Cir., filed Nov. 27, 1979), wherein we found no clear congressional intent to diminish the boundaries of the reservation there in question. In the present appeal, the boundaries of the reservation were clearly diminished. The Band claims, however, that even so, its rights to fish and hunt pursuant to prior treaties were not abrogated. Again, we disagree and we affirm on the basis of the trial court's well reasoned decision of March 28, 1979.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[2] Pursuant to the Nelson Act of January 14, 1889, 25 Stat. 642, and the Act of February 20, 1904, 33 Stat. 46, the Band ceded to the United States "all our right, title, and interest in and to all" of the land here in question.

APPENDIX B

UNITED STATES of America, Plaintiff,

v.

STATE OF MINNESOTA, Defendant,

and

Counties of Roseau, Pennington, Marshall, Red Lake, Polk, Clearwater, Beltrami, Lake of the Woods and Koochiching, Intervening Defendants.

Civ. No. 6-76-465.

United States District Court,
D. Minnesota,
Sixth Division.

March 28, 1979.

Memorandum and Order

DEVITT, Chief Judge.

Introduction

The Red Lake Band of Minnesota Chippewa Indians, represented by the United States government, seeks a declaratory judgment that its members retain hunting, fishing, trapping, and wild ricing rights in an area the Band ceded to the federal government in 1889 and 1904. That area encompasses about 2.6 million acres in northwestern Minnesota adjacent to the present diminished Red Lake Reservation. The position of the Indians basically is that those rights were guaranteed them in an 1863 treaty and were not abrogated by the subsequent 1889 and 1904 land cessions. Defendant State of Minnesota and intervening defendant counties disagree. They assert that in 1889 and 1904 the Red Lake Indians expressly relinquished all their right, title, and interest in the ceded area, which of necessity

must include hunting, fishing, trapping, and wild ricing rights. The parties have submitted the issue on exhibits, briefs, and oral arguments. The court concludes that the Red Lake Band did not retain hunting, fishing, trapping, or wild ricing rights in the area ceded in 1889 and 1904.

Summary of Facts

Prior to the influx of white settlers, the Red Lake Band inhabited a large area of northwestern Minnesota encompassing about 13 million acres. In 1863, the Band, in its first significant treaty with the federal government, ceded about 10 million acres of their land to the United States. This cession, known as the 1863 Treaty at the Old Crossing of the Red Lake River, was negotiated by Alexander Ramsey. The treaty contains no mention of hunting and fishing rights, but the transcript of Ramsey's negotiations with the Band makes clear that the Indians were promised they could continue to hunt and fish on the ceded land until it was settled. *See* Journal of Proceedings Connected with the 1863 Treaty at the Old Crossing of the Red Lake River, at pp. 8, 15, 27, 37-38, 47, 54 (Plaintiff's Exhibit 53). After the 1863 Treaty at the Old Crossing, the Red Lake Reservation consisted of about 3.2 million acres. It is in this area, not the entire original 13 million acres, that the Band now claims it has retained hunting, fishing, trapping, and wild ricing rights.

The second land cession by the Red Lake Band occurred in 1889. In that year Congress passed the Nelson Act, which authorized negotiations for the purchase of land from the Red Lake Band. A three member commission, which became known as the Rice Commission, was appointed to conduct negotiations. The commission was instructed by Congress to obtain an agreement with the Band "for the cession and relinquishment in writing of all their title and interest in and to" the lands the Band agreed to sell. Any such agreement, upon approval of the President, was to "operate as a complete extinguishment of the Indian title" to the ceded land. See Nelson Act of January 14,

1889, c. 24, 25 Stat. 642 (Amicus' Exhibit M). Pursuant to the Nelson Act the Rice Commission negotiated an agreement with the Red Lake Band for the cession of about 2.4 million acres of the Band's land. In that agreement the Band agreed to "grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to all" of the 2.4 million ceded acres. Neither the Nelson Act, the agreement, nor the transcript of the negotiations contain any reference to reserved hunting, fishing, trapping, or wild ricing rights in the ceded area.

The final land cession by the Red Lake Band occurred in 1904. Congress authorized negotiations by the Act of March 3, 1901, 31 Stat. 1077, and Inspector James McLaughlin negotiated an agreement with the Band in 1902. The agreement contained language of conveyance similar to the Nelson Act, and, like in the Nelson Act, no mention was made of reserved hunting, fishing, trapping, or wild ricing rights. The agreement was not ratified by Congress because of disagreement over method of payment, but Congress in 1904 did consummate the cession on terms substantially identical to the 1902 agreement, except for method of payment. *See* Act of Feb. 20, 1904, 33 Stat. 46. As a result, the size of the Red Lake Reservation was reduced to about 543,000 acres. The reservation was increased to its present size when approximately 160,000 acres were restored to tribal ownership pursuant to the 1934 Indian Reorganization Act, 48 Stat. 984.

Subsequent to the 1904 cession, the State of Minnesota has consistently enforced its gaming laws against Band members who hunt and fish in the area ceded in 1889 and 1904, except for the area later restored to tribal ownership. Both the state and the federal government have taken the position, up until 1976, that Band members have no unique hunting, fishing, trapping, or wild ricing rights in the ceded area. Moreover, while Band members have often violated State gaming laws over the years in the area at issue, there is virtually no evidence that, up until commencement of this litigation, the Band seriously contended

that the state had no jurisdiction over its hunting, fishing, trapping, and wild ricing activities in the ceded area.

DISCUSSION

Principles of Treaty Construction

[1, 2] In numerous opinions over the years the United States Supreme Court has established certain basic principles of treaty and statutory construction when Indian land cessions are at issue. The Court has recognized on many occasions that treaties and agreements with the Indians cannot be considered as exercises in ordinary conveyancing, because of the dependent status of the Indians and the nonconsensual nature of the cessions. Rather, cession treaties and agreements must be interpreted as the Indians understood them, and doubtful expressions must be resolved in their favor. *See e.g., Choctaw Nation* v. *Oklahoma,* 397 U.S. 620, 630-631, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970); *Winters* v. *United States,* 207, U.S. 564, 576, 28 S.Ct. 207, 52 L.Ed. 340 (1908). Similar principles apply when construing congressional enactments, such as the Nelson Act, which purportedly alter property rights of Indians. The Supreme Court has ruled that Congressional intent to abrogate Indian property rights must be clear from the face of the Act or surrounding circumstances, and that doubtful expressions in the Act must be resolved in favor of the Indians. *See e.g., DeCoteau* v. *District County Court,* 420 U.S. 425, 444, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164, 174, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd,* 291 U.S. 138, 160, 54 S.Ct. 361, 78 L.Ed. 695 (1934).

[3] The above principles require the court to take a sympathetic view toward the position of the Red Lake Band, but those principles do not permit us to ignore the clear wording of a treaty, agreement, or enactment, or to disregard the intent of Congress. The Supreme Court has cautioned that the courts cannot remake history or expand treaties and legislation beyond

their clear terms to remedy a perceived injustice suffered by the Indians. *E. g., Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *Choctaw Nation* v. *United States,* 318 U.S. 423, 431, 63 S.Ct. 672, 87 L.Ed. 877 (1943).

[4] To determine the intent of Congress and understanding of the Indians, the court must analyze the wording of the treaties, agreement, and enactments, the prior history, the surrounding circumstances, and the subsequent construction given those documents by the parties. *See, e. g., Choctaw Nation* v. *United States,* 318 U.S. 423, 431, 63 S.Ct. 672, 87 L.Ed. 877 (1943).

Wording of the Agreements and Enactments

[5, 6] At issue here is whether the 1889 and 1904 land cessions resulted in extinguishment of all the Indians' property rights in the ceded areas, in particular the right to hunt, fish, trap, and gather wild rice. Therefore, the language used in the enactments and agreements that resulted in those cessions must be analyzed. Each of these documents contain variations of essentially the same language, that the Band relinquishes "all its right, title, and interest in and to" the ceded area. None of the documents mention the retention of hunting, fishing, trapping, or wild ricing rights.

Two recent United States Supreme Court decisions have construed Indian cession agreements and enactments with language nearly identical to that quoted above. *See Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *DeCoteau* v. *District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975). These cases make clear that the "all right, title, and interest" language is "precisely suited" for the purpose of eliminating Indian title and conveying to the government all the Band's interest in the ceded lands. *DeCoteau, supra,* at 445, 95 S.Ct. 1082; *Rosebud, supra,* at 1366. In the present case, this intent is fortified by the further express language of the 1889 Nelson Act, that the cession was to

"operate as complete extinguishment of the Indian title" to the land sold by the Red Lake Band.

If the cessions extinguished Indian title to the ceded areas, they also would have the effect of abrogating any aboriginal hunting, fishing, trapping, or wild ricing rights. These rights are mere incidents of Indian title, not rights separate from Indian title, and consequently if Indian title is extinguished so also would these aboriginal rights be extinguished. *Compare United States* v. *Klamath Indians,* 304 U.S. 119, 58 S.Ct. 799, 82 L.Ed. 1219 (1938); *see generally,* Cohen, *Original Indian Title,* 32 Minn.L. Rev. 28 (1947). Thus, the language used was "precisely suited" for relinquishment of the very rights the Band now claims it retained.[1]

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[1] The Band asserts that *DeCoteau* and *Rosebud* are not controlling, but rather that *Menominee Tribe* v. *United States,* 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968) mandates a different result. *Menominee,* argues the Red Lake Band, establishes a rule of construction that, for hunting and fishing rights to be relinquished, they must be specifically mentioned in the relevant Act of Congress or agreement, or at least there must be clear evidence that Congress intended to abrogate those specific rights. Properly read, however, *Menominee* is not inconsistent with *DeCoteau, Rosebud,* or the present case. In *Menominee,* Congress terminated the reservation status of the tribe's land and conveyed the land to a corporation owned by the tribe. The Supreme Court analyzed the legislative history and surrounding circumstances of the Termination Act and concluded that Congress did not intend to abrogate the tribe's preexisting treaty hunting and fishing rights over the tribe's land. In the present case, the Congressional enactments at issue, the Nelson Act and the Act of 1904, unlike the Termination Act in *Menominee,* resulted in the sale of the Band's land to the government. The purpose of the Acts in this case were entirely different from the Termination Act — to eliminate Indian title, restore the land to the public domain, and allow for settlement by whites. Thus, following the same analysis, determining Congressional intent with doubts construed in favor of the Indians, the Court in *Menominee* could reasonably determine that the Termination Act did not abrogate hunting and fishing rights, while the court in the present case, involving an entirely different type of statute, could reasonably reach the opposite conclusion.

Under defendant's and defendant intervenor's view of the case, the court's analysis should stop at this point; if Indian title to the ceded area was relinquished in 1889 and 1904, then the Band retains no hunting, fishing, trapping, or wild ricing rights in the ceded area. Analysis should not stop here, however. Extinguishment of Indian title eliminates aboriginal hunting, fishing, trapping, and wild ricing rights, but it does not necessarily preclude the possibility that similar rights were granted back to the Band in exchange for the land cessions. *See, e. g., United States* v. *Winans,* 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). The wording of the agreements and enactments makes this possibility quite remote. We must, nonetheless, examine the prior history, surrounding circumstances, and sebsequent construction by the parties to determine whether there was an understanding, not reduced to writing, that the Band members could continue permanently to hunt, fish, trap and gather wild rice in the ceded areas.

Prior History

The first land cession treaty with the Red Lake Band occurred in 1863. Prior to that time, however, the Chippewa Indians did enter into a number of cession treaties, although non involved the Red Lake Band specifically or the land at issue in this case. Four of these early treaties contained express provisions that reserved Indian hunting and fishing rights in areas ceded by the treaties. However, those rights normally were reserved only until when "the land is required for settlement" or "until required to remove by the President." *See* Treaty of 1854 with the Chippewa Indians of Lake Superior and the Mississippi, Act II, 10 Stat. 1109 (1854) (Amicus' Exhibit G); Treaty of 1842 with the Chippewa Indians of the Mississippi and Lake Superior, Act III, 7 Stat. 591 (1842) (Amicus' Exhibit D); Treaty of 1834 with the Chippewa Nation of Indians, Art. 5, 7 Stat. 536 (1837) (Amicus' Exhibit C); Treaty of 1836 with the Ottawa and Chippewa Nations of Indians, Art. Thirteenth, 7 Stat. 491 (1836) (Amicus' Exhibit B). Consequently, these early treaties indicate

two things: first, that the normal practice was to state in the agreement if the Band was reserving hunting and fishing rights in the ceded area, and second, that when those rights were reserved it was only for a limited duration, typically until the influx of white settlers occurred.

The first land cession treaty by the Red Lake Band was the 1863 Treaty at the Old Crossing of the Red Lake River. In that treaty the Band ceded about 10 million of the approximately 13 million acres to which it held aboriginal Indian title, including most of the fertile Red River Valley. That treaty on its face did not mention hunting, fishing, trapping, or wild ricing rights. The transcript of the negotiations with the Indians makes clear, however, that the Band was told it could continue to hunt and fish as before over the ceded area. For example, Alexander Ramsey, the government negotiator, told the Band that: "If [you] sold the lands [you] could still occupy and hunt over it as heretofore, probably for a long time. It would not probably be wanted for settlement before the youngest man among [you] was a grey-headed old man." Journal of Proceedings Connected with the 1863 Treaty at the Old Crossing of the Red Lake River, at 15 (Plaintiff's Exhibit 53).

The Band bases much of its arguments on Ramsey's promises in 1863. While it is true that Ramsey promised the Band it could hunt and fish as before, that promise, like the express ones contained in earlier treaties, was for only a limited duration — until the land became inhabited by white settlers. More significantly, what Ramsey told the Band in 1863 is only peripherally relevant to the issues in this case. The Band is not claiming that it has rights in the 10 million acre area ceded in 1863, but only in the 3.2 million acres it retained after the 1863 treaty. Therefore, Ramsey's promises about hunting and fishing in the area ceded in 1863, while shedding some light on the Band's understanding of the effect of a land cession, do not create rights in the area subsequently ceded in 1889 and 1904. Treaties prior to 1889 therefore contain some suggestion of a practice of letting the In-

dians hunt and fish on ceded lands until they were settled by the whites, but the prior history provides little meaningful support for the claims now made by the Red Lake Band.

Surrounding Circumstances and Legislative History

The circumstances surrounding the 1889 and 1904 cessions also provide little support for the Band's position. The only significant historical evidence in favor of the Indians is a statement by a Band spokesman in 1902 concerning his recollection of what the Indians were told by the Rice Commission in 1889:

> We were given to understand that we had the use of any ceded land that was not occupied by settlers, to be used as our own. And we furthermore reserved the privilege of using that as our hunting grounds as in former years.

Transcript of Council with the Red Lake Band on March 4, 1902, *reprinted at* Hearings Before the Committee on Indian Affairs, House of Representatives, 66th Cong., 2d Sess. 201, 208 (1920). This recollection by the Band spokesman, made thirteen years after the event, is the primary hard evidence upon which the Band rests its case.

The Band's position is refuted by numerous pieces of historical evidence. The legislative history of the 1889 Nelson Act makes no mention of reserved hunting and fishing right, but rather makes clear that the purpose of the Act is to restore the land to the public domain and open it to settlement by whites. *See generally* H.R.Rep.No.789, 50th Cong., 1st Sess. (1888) (Defendant's Exhibit F). Also, Congress has just recently enacted the Dawes Act in 1887, which established a policy of encouraging Indians to abandon their nomadic ways and adopt the agrarian lifestyle of whites. *See* Act of Feb. 8, 1887, c. 119, 24 Stat. 388. This suggests that Congress in 1889 probably would not have intended to allow the Red Lake Band to continue permanently its nomadic hunting and fishing habits over the lands ceded to the federal government.

The evidence against the Band is further reinforced by the transcripts of the negotiations in 1889 and 1902. Contrary to the assertions of the Band spokesman in 1902, the negotiations with the Red Lake Band in 1889 contain no mention of reserved rights, stating instead that the purpose of the negotiations was to effect the sale of land not being used by the Indians. *See, e. g.*, Transcript of Council at Red Lake from June 29 through July 6, 1889, H.R.Exec.Doc.No.247, 51st Cong., 1st Sess., at 67, 80. Moreover, the Rice Commission, pursuant to the Nelson Act, negotiated with other Minnesota Chippewa Bands in 1889, and at least two of those Bands were told that under the Nelson Act they would not retain special hunting and fishing rights in ceded areas, but instead would be subject to state gaming laws the same as non-Indians. *Id.* at 169 (Mille Lac Band); 178 (Grand Portage Band). Finally, in 1902 Inspector McLaughlin specifically instructed the Red Lake Band that after the 1904 cession it would be subject to state gaming laws to the same extent as non-Indians. *See* Transcript of March 4, 1902 Council with the Red Lake Band, *reprinted at* Hearings Before the Committee on Indian Affairs, House of Representatives, 66th Cong. 2d Sess. 201, 226 (1920).

The surrounding circumstances, and legislative history, therefore do not provide support for the position urged by the Red Lake Band. The historical evidence with respect to the legislative history and the negotiations with the Band, if anything, tends to confirm that the enactments and agreements meant exactly what they said — the Band relinquished "*all* its right, title, and interest" to the areas ceded in 1889 and 1904.

Subsequent Construction

The final factor to be considered is the subsequent construction that the parties have given the relevant enactments and agreements. *See DeCoteau* v. *District County Court,* 420 U.S. 425, 442, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975). The parties concede that both the state and federal governments have con-

sistently taken the view over the years that the Band has no greater rights in the ceded area than non-Indians. Moreover, state gaming laws have been regularly enforced against activities of Band members in the ceded areas since the cessions occurred.

Conclusion

The Band's position in this case is based on scanty and inconclusive evidence. This evidence, claims the Band, is sufficient, when combined with the rules of construction favoring the Indians, to mandate a ruling in favor of the Band. The court is of the view, however, that if the rules of construction were invoked as the Band requests, we would be using those rules to remake history in derogation of the clear wording and intent of the relevant enactments and agreements. As the Supreme Court observed in *Choctaw Nation* v. *United States,* 318 U.S. 423, 431-32, 63 S.Ct. 672, 87 L.Ed. 877 (1943) (citations omitted):

> Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.

We hold that the Red Lake Band does not retain hunting, fishing, trapping, or wild ricing rights in the areas ceded in 1889 and 1904. The clerk is directed to enter judgment accordingly.

APPENDIX C

January 14, 1889

CHAP. 24 — An act for the relief and civilization of the Chippewa Indians in the State of Minnesota.

Chippewa Indians of Minnesota.
Commissioners to negotiate for relinquishment of lands to be appointed.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States is hereby authorized and directed, within sixty days after the passage of this act, to designate and appoint three Commissioners, one of whom shall be a citizen of Minnesota, whose duty it shall be, as soon as practicable after their appointment, to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest

Lands excepted.

in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated; and such cession and relinquishment shall be deemed sufficient as to each of said several reservations, except as to the

Assent of tribes.

Red Lake Reservations, if made and assented to in writing by two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to such reservations; and as to the Red Lake Reservation the cession and relinquishment shall be deemed sufficient if made and assented to in like manner by two-thirds of the male adults of all the Chippewa

Indians in Minnesota; and provided that all agreements therefor shall be approved by the President of the United States before taking effect: *Provided further,* That in any case where an allotment in severalty has heretofore been made to any Indian of land upon any of said reservations, he shall not be deprived thereof or disturbed therein except by his own individual consent separately and previously given, in such form and manner as may be prescribed by the Secretary of the Interior. And for the purpose of ascertaining whether the proper number of Indians yield and give their assent as aforesaid, and for the purpose of making the allotments and payments hereinafter mentioned, the said commissioners shall, while engaged in securing such cession and relinquishment as aforesaid and before completing the same, make an accurate census of each tribe or band, classifying them into male and female adults, and male and female minors; and the minors into those who are orphans and those who are not orphans, giving the exact numbers of each class, and making such census in duplicate lists, one of which shall be filed with the Secretary of the Interior, and the other with the official head of the band or tribe; and the acceptance and approval of such cession and relinquishment by the President of the United States shall, be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided.

Proviso.
Allottees not to be disturbed.

Census to be taken.

Assent to extinguish Indian title.

Bond and oath of commissioners.

SEC. 2. That the said commissioners shall, before entering upon the discharge of their duties, each give a bond to the United States in the sum

of ten thousand dollars, with sufficient sureties, to be approved by the Secretary of the Interior, and conditioned for the faithful discharge of their duties under this act, and they shall also each take an oath to support the Constitution of the United States, and to faithfully discharge the duties of their office, which bonds and oaths shall be filed with the Secretary of the Interior. Said commissioners shall be entitled to a compensation of ten dollars per day for each day actually employed in the discharge of their duties, and for their actual traveling expenses and board, not exceeding three dollars per day. Said commissioners shall also be authorized to employ a competent interpreter while engaged in the performance of their duties, at a compensation and allowance to be fixed by them, not in excess of that allowed to each of them under this act.

Compensation.

Interpreter.

Removal of Indians to White Earth Reservation.

SEC. 3 That as soon as the census has been taken, and the cession and relinquishment has been obtained, approved, and ratified, as specified in section one of this act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the

Allotment of lands on Red Lake Reservation.

Vol. 24, p. 388.

United States and the Territories over the Indians, and for other purposes"; and all allotments heretofore made to any of said Indians on the White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: *Provided, however,* That the amount heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled under this act: *Provided further,* That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation.

Prior allotments confirmed.
Provisos.

Deductions.

Allotments on other reservations.

Survey of ceded lands.

SEC. 4. That as soon as the cession and relinquishment of said Indian title has been obtained and approved as aforesaid, it shall be the duty of the Commissioners of the General Land Office to cause the lands so ceded to the United States to be surveyed in the manner provided by law for the survey of public lands, and as soon as practicable after such survey has been made, and the report, field-notes, and plats thereof filed in the General Land Office, and duly approved by the Commissioner thereof, the said Secretary of the Interior, upon notice of the completion of such surveys, shall appoint a sufficient number of competent and experienced examiners, in order that the work may be done within a reasonable time, who shall go upon said lands thus surveyed and personally make a careful, complete, and thorough examination of the same by forty-acre lots, for the purpose of ascertaining on which lots or tracts there

Subdivision into forty-acre lots.

is standing or growing pine timber, which tracts on which pine timber is standing or growing for the purposes of this act shall be termed "pine lands," the minutes of such examination to be at the time entered in books provided for that purpose, showing with particularity the amount and quality of all pine timber standing or growing on any lot or tract, the amount of such pine timber to be estimated by feet in the manner usual in estimating such timber, which estimates and reports of all such examinations shall be filed with the Commissioner of the General Land Office as a part of the permanent records thereof, and thereupon that officer shall cause to be made a list of all such pine lands, describing each forty-acre lot or tract thereof separately, and opposite each such description he shall place the actual cash value of the same, according to his best judgment and information, but such valuation shall not be at a rate of less than three dollars per thousand feet, board measure of the pine timber thereon, and thereupon such lists of lands so appraised shall be transmitted to the Secretary of the Interior for approval, modification, or rejection, as he may deem proper. If the appraisals are rejected as a whole then the Secretary of the Interior shall substitute a new appraisal and the same or original list as approved or modified shall be filed with the Commissioner of the General Land Office as the appraisal of said lands, and as constituting the minimum price for which said lands may be sold, as hereinafter provided, but in no event shall said pine lands be appraised at a rate of less than three dollars per thousand feet board measure of the pine timber thereon. Duplicate lists of said lands as appraised, together with

"Pine lands."

Minimum valuations.

New appraisals.

Lists to be filed.

copies of the field-notes, surveys, and minutes of examinations shall be filed and kept in the office of the register of the land office of the district within which said lands may be situated, and copies of said lists with the appraisals shall be furnished to any person desiring the same upon application to the Commissioner of the General Land Office or to the register of said local land office.

Pay of examiners.

The compensation of the examiners so provided for in this section shall be fixed by the Secretary of the Interior, but in no event shall exceed the sum of six dollars per day for each person so employed, including all expenses.

"Agricultural lands."

All other lands acquired from the said Indians on said reservations other than pine lands are for the purposes of this act termed "agricultural lands."

Sale of pine lands.

SEC. 5. That after the survey, examination, and appraisals of said pine lands has been fully completed they shall be proclaimed as in market and offered for sale in the following manner: The Commissioner of the General Land Office shall

Advertisement.

cause notices to be inserted once in each week for four successive weeks in one newspaper of general circulation published in Minneapolis, Saint Paul, Duluth, and Crookston, Minnesota; Chicago, Illinois; Milwaukee, Wisconsin; Detroit, Michigan, Philadelphia and Williamsport, Pennsylvania; and Boston, Massachusetts, of the sale

Auction sale.

of said lands at public auction to the highest bidder for cash at the local land office of the district within which said lands are located, said notice to state the time and place and terms of such sale. At

such sale said lands shall be offered in forty-acre parcels, except in case of fractions containing either more or less than forty acres, which shall be sold entire. In no event shall any parcel be sold for a less sum than its appraised value. The residue of such lands remaining unsold after such public offering shall thereafter be subject to private sale for cash at the appraised value of the same upon application at the local land office.

Private sale.

Sale of agricultural lands.

SEC. 6. That when any of the agricultural lands on said reservation not allotted under this act nor reserved for the future use of said Indians have been surveyed, the Secretary of the Interior shall give thirty days' notice through at least one newspaper published at Saint Paul and Crookston, in the State of Minnesota, and, at the expiration of thirty days, the said agricultural lands so surveyed, shall be disposed of by the United States to actual settlers only under the provisions of the homestead law: *Provided,* That each settler under and in accordance with provisions of said homestead laws shall pay to the United States for the land so taken by him the sum of one dollar and twenty-five cents for each and every acre, in five equal annual payments, and shall be entitled to a patent therefor only at the expiration of five years from the date of entry, according to said homestead laws, and after the full payment of said one dollar and twenty-five cents per acre therefor, and due proof of occupancy for said period of five years; and any conveyance of said lands so taken as a homestead, or any contract touching the same, prior to the date of final entry, shall be null and void: *Provided,* That nothing in this act shall be held to authorize the sale or other

To be sold under homestead law.
Provisos.

Price, etc.

Prior entries not disturbed.

disposal under its provision of any tract upon which there is a subsisting, valid, pre-emption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon: *Provided,* That any person who has not heretofore had the benefit of the homestead or pre-emption law, and who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws may make a second homestead entry under the provisions of this act.

Second entries.

Funds to be deposited to credit of Chippewas.

SEC. 7. That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the

Interest.

Distribution of interest.

like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares: *Provided,* That Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof. The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made, until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; the payments of such interest to be made yearly in advance, and, in the discretion of the Secretary of the Interior, may, as to three-fourths thereof, during the first five years be expended in procuring live-stock, teams, farming implements, and seed for such of the Indians to the extent of their shares as are fit and desire to engage in farming, but as to the rest, in cash; and

Schools.

Proviso.
Advances, from principal.

Anticipating interest.

Aids to farming.

Re-imbursement.

whenever said permanent fund shall exceed the sum of three million dollars the United States shall be fully reimbursed out of such excess, for all the advances of interest made as herein contemplated and other expenses hereunder.

Appropriation.

SEC. 8. That the sum of one hundred and fifty thousand dollars is hereby appropriated, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated, to pay for procuring the cession and relinquishment, making the census, surveys, appraisals, removal and allotments, and the first annual payment of interest herein contemplated and provided for, which money shall be expended under the direction of the Secretary of the Interior in conformity with the provisions of this act. A detailed statement of which expenses, except the interest aforesaid, shall be reported to Congress when the expenditures shall be completed.

Approved, January 14, 1889.

APPENDIX D

February 20, 1904.
[S. 1490.]
[Public, No. 23.]

CHAP. 161.—An Act To authorize the sale of a part of what is known as the Red Lake Indian Reservation, in the State of Minnesota.

Preamble.
Red Lake Indian Reservation, Minnesota.
Vol. 32, p. 1009.

Whereas James McLaughlin, United States Indian inspector, did, on the tenth day of March, anno Domini nineteen hundred and two, make and conclude an agreement with the adult male Indians of the Red Lake Reservation, in the State of Minnesota, which said agreement is in words and figures as follows:

Agreement with Chippewa Indians for sale of.

"This agrement made and entered into this tenth day of March, nineteen hundred and two, by and between James McLaughlin, United States Indian Inspector, on the part of the United States, and the Red Lake and Pembina bands of Chippewa Indians belonging on the Red Lake Reservation in the State of Minnesota, witnesseth:

Lands ceded.

"ARTICLE I. The said Indians belonging on the Red Lake Indian Reservation, Minnesota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title and interest in and to all that part of the Red Lake Indian reservation situate within the boundaries of Red Lake County, Minnesota, as said county is at present defined and organized the tract hereby ceded being more particularly described as embracing all that part of the said Red Lake Indian Reservation lying west of the range line between ranges thirty-eight (38) and thirty-nine (39) west of the Fifth (5th) Principal Meridian, the tract of land hereby ceded approximating two hundred and fifty-six thousand one hundred and fifty-two (256,152)

acres, and also hereby agree that all of said Indians now residing on the tract hereby ceded shall remove to the diminished reservation within six months after the ratification of this agreement, and shall be paid not exceeding five thousand (5000) dollars in cash by the Indians of said Red Lake Reservation out of the first payment received by them from the proceeds of this cession said five thousand (5000) dollars, or so much thereof as may be necessary, to be paid equitable to those thus removing, in proportion to the value of their respective improvements, which payment by said Red Lake Indians, shall be in full for all improvements which they will abandon, and also for the removal within the diminished reservation of their dead from where they are now buried on the tract hereby ceded.

Price.

"ARTICLE II. In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement, the United States stipulates and agrees to pay to said Indians, in the manner hereinafter provided, the sum of one million (1,000,000) dollars.

Per capita payment in cash

"ARTICLE III. It is understood that of the amount to be paid to said Indians, as stipulated by Article II of this agreement, the sum of two hundred and fifty thousand (250,000) dollars shall be paid in cash, per capita, share and share alike, to each man, woman and child belonging on said Red Lake Indian Reservation, within ninety (90) days after the ratification of this agreement, and the remainder of the said sum of one million dollars, viz, seven hundred and fifty thousand (750,000) dollars shall be paid in cash, per capita, in fifteen (15) annual installments of fifty thou-

sand (50,000) dollars each, the first of which fifteen annual installments to be paid in the month of October of the year following that in which payment of the said two hundred and fifty thousand (250,000) dollars is made, as provided in this agreement, and in the month of October of each year thereafter of the succeeding fourteen years, covering the period of said fifteen annual installments.

Apportionment of lands.

"ARTICLE IV. It is further agreed that the said Indians belonging on said Red Lake Indian Reservation, Minnesota, shall possess their diminished Reservation independent of all other bands of the Chippewa tribe of Indians and shall be entitled to allotments thereon of one hundred and sixty (160) acres each, of either agricultural or pine land, the different class of land to be apportioned as equitably as possible among the allottees.

Benefits under existing treaties not disturbed.

"ARTICLE V. It is understood that nothing in this agreement shall be construed to deprive the said Indains belonging on the Red Lake Indian Reservation, Minnesota, of any benefits to which they are entitled under existing treaties for agreements not inconsistent with the provisions of this agreement.

Effect.

"ARTICLE VI. This agreement shall take effect and be in force when signed by United States Indian Inspector James McLaughlin and by a majority of the male adult Indians, parties hereto, and when accepted and ratified by the Congress of the United States.

"In witness whereof the said James McLaughlin, United States Indian Inspector, on the part of

the United States, and the male adult Indians belonging on the Red Lake Indian Reservation, Minnesota, have hereunto set their hands and seals at Red Lake Indian Agency, Minnesota, this tenth day of March, A.D. Nineteen hundred and two.

"JAMES McLAUGHLIN (SEAL).
"United States Indian Inspector.

And

Whereas it is deemed for the best interests of the said Indians that said agreement be amended and modified as hereafter provided:

Therefore,

Agreement amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same is hereby, modified and amended so as to read as follows:

Lands ceded.

"ARTICLE I. The said Indians belonging to the Red Lake Indian Reservation, Minnesota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Red Lake Indian Reservation lying west of the range line between ranges thirty-eight and thirty-nine, west of the fifty principal meridian, the tract of land hereby ceded approximating two hundred and fifty-six thousand one hundred and fifty-two acres, and also hereby agree that all of said Indians now residing on the tract hereby ceded shall remove to the diminished reservation within six months after the ratifica-

Removal of Indians to diminished reservation.

tion of the agreement, and shall be paid not exceeding twenty thousand dollars in cash by the Indians of said Red Lake Reservation out of the first payment received by them from the proceeds of this cession, said twenty thousand dollars, or so much thereof as may be necessary, to be paid equitably to those thus removing, in proportion to the value of their respective improvements, which payment by said Red Lake Indians shall be in full for all improvements which they will abandon, and also for the removal within the diminished reservation of their dead from where they now are buried on the tract hereby ceded.

Sale of ceded lands.

"ART. II. In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement the United States stipulates and agrees to sell, subject to the homesteead laws of the United States, under rules and regulations to be prescribed by the Secretary of the Interior, in tracts not to exceed one hundred and sixty acres to each individual, all of said lands, except lands remaining unsold after five years from the first sale hereunder, which may be sold without reference to the provisions of the homestead law. Said land shall be sold for not less than four dollars per acre, and shall be sold upon the following terms: One-fifth of the purchase price to be paid at the time of sale and the balance of the purchase price of said land to be paid in five equal annual installments due in one, two, three, four, and five years from date of sale, respectively, and to pay over to said Indians all of the proceeds realized from the sale of the said lands as herein provided.

Minimum price per acre.

Payments.

Per capita distribution.

"ART. III. It is understood that of the amount realized from the sale of said lands a sum of not

exceeding three hundred thousand dollars shall be paid in cash per capita, share and share alike, to each man, woman, and child belonging on said Red Lake Indian Reservation within ninety days after the first sale herein provided for, and the remainder of the proceeds of the sale of said lands shall be paid in cash per capita in fifteen annual installments, the first of which fifteen annual installments is to be paid in the month of October of the year following that in which the payment of the said three hundred thousand dollars is made, as provided in this agreement, and in the month of October of each year thereafter, and all moneys received after the expiration of said fifteen years shall be apportioned in like manner among said Indians and paid to them on the first day of October in each year.

Independent possession and allotment.

"ART. IV. It is further agreed that the said Indians belonging on the said Red Lake Indian Reservation, Minnesota, shall possess their diminished reservation independent of all other bands of the Chippewa tribe of Indians and shall be entitled to allotments thereon of one hundred and sixty acres each, of either agricultural or pine land, the different classes of land to be apportioned as equitably as possible among the allottees.

Existing benefits not affected.

"ART. V. It is understood that nothing in this agreement shall be construed to deprive the said Indians belonging on the Red Lake Indian Reservation, Minnesota, of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this agreement. It is the intention of this agreement that the United States shall act as trustee for said Indians

Trusteeship.

to dispose of said land and to expend and pay over the proceeds as received from the sale thereof only as received, as herein provided.

Effect.

"ART VI. This agreement shall take effect and be in force when accepted and ratified by the Congress of the United States."

Ratification.

SEC. 2. That said agreement be, and the same is hereby, accepted and ratified as herein amended.

Lands to be sold subject to homestead laws.

SEC. 3. That the Secretary of the Interior is hereby authorized and directed to sell, subject to the homestead laws of the United States, under such rules and regulations as he may prescribe, in tracts not to exceed one hundred and sixty acres to each individual, all that part of the Red Lake Reservation, in the State of Minnesota, lying westerly of the range line between ranges thirty eight and thirty-nine west of the fifth principal meridian, approximating two hundred and fifty-six thousand acres. And the said land shall be sold for not less than four dollars per acre, and shall be sold upon the following terms: One-fifth of the price bid therefor to be paid at the time the bid is made, and the balance of the purchase price of said land to be paid in five equal annual installments, due in one, two, three, four, and five years from date of sale, respectively, payment to be made to the receiver of the United States land office for the district in which said land may be situated. And in case any purchaser fails to make such annual payments promptly when due, or within sixty days thereafter, all rights in and to the land covered by his or her purchase shall at once cease, and any payments made shall thereupon be

Forfeiture.

Patents.

forfeited and the Secretary of the Interior shall thereupon declare such forfeiture by reoffering said land for sale. And no patent shall issue to the purchaser until the purchaser shall have paid the purchase price and in all respects complied with the terms and provisions of the homestead laws of the United States: *Provided*, That such purchaser shall have the right of commutation as provided by section twenty-three hundred and one of the Revised Statutes of the United States, by paying for the land at the price for which it sold, receiving credit for payments previously made: *Provided further,* That such purchaser shall make his final proof conformable to the homestead laws within six years from the date of sale: that aliens who have declared their intention to become citizens of the United States may become purchasers under this Act, but before making final proof and acquiring title must take out their full naturalization papers; and that persons who may have heretofore exhausted their rights under the homestead law may become purchasers under this Act: *Provided further*, That after the first sale hereunder shall be closed, the lands remaining unsold shall be subject to sale and entry at the price of four dollars per acre by qualified purchasers, subject to the same terms and conditions as herein prescribed as to lands sold at said first sale: *Provided further*, That all lands above described which shall remain unsold at the expiration of five years from the date of the first sale hereunder shall be offered for sale at not less than four dollars per acre (and lands remaining unsold after such sale shall be subject to private entry and sale at said price), without any conditions whatever except the payment of the purchase price: *And*

Provisos.
Commutation.
R.S., see 2301, p. 421.

Final proof.

Sale, etc., of remaining lands.

Minimum price.

Prior residence and improvements.

provided further, That wherever the boundary line of said reservation runs diagonally so as to divide any Government subdivision of a section, and the owner of that portion of such subdivision now being outside of the reservation becomes the purchaser of that portion of such subdivision lying within the reservation, residents and improvements upon either portions of such subdivision as provided by the homestead law shall constitute a compliance as to all such Government subdivisions.

Removal of Indians to diminished reservation.

All of the Indians residing upon the tract above described shall remove therefrom to the diminished reservation within six months after the passage of this Act; and there is hereby appropriated from the proceeds of said sale the sum of twenty thou-

Payment for improvements.

sand dollars, or so much thereof as may be necessary, to be paid to those thus removing in proportion to their respective improvements, which payment to the said Red Lake Indians shall be in full for all improvements which they will abandon, and also for the expense of removal within the diminished reservation of their dead from where they are now buried on the tract above described, and the expense of making allotments.

Per capital distribution of proceeds.

The proceeds of said lands as realized from time to time shall be paid into the United States Treasury to the credit of the Indians belonging on said reservation. Of the amount realized from the sale of said lands a sum not exceeding three hundred thousand dollars shall be paid in cash, per capita, share and share alike, to each man, woman, and child belonging on said Red Lake Indian Reservation within ninety days after the first

sale herein provided for, and the remainder of the proceeds of the sale of said lands shall be paid in cash, per capita, in fifteen annual installments, the first installment to be paid in the month of October of the year following that in which the payment of the three hundred thousand dollars is made; and all moneys received after the expiration of said fifteen years shall be apportioned in like manner among said Indians and paid to them on the first day of October in each year.

Regulations, etc.

The Secretary of the Interior is hereby vested with full power and authority to make such rules and regulations as to the time of notice, manner of sale, and other matters incident to the carrying out of the provisions of this Act as he may deem necessary, and with authority to continue making sale of said lands until all of said lands shall have been sold.

Entry fees, etc.

In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre.

United States not bound to purchase land, etc.

SEC. 4. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received as herein provided.

Effect.

SEC. 5. That this Act shall take effect and be in force from and after its passage.

Approved, February 20, 1904.

APPENDIX E

Treaty With The Chippewa—Red Lake And Pembina Bands, 1863.

Oct. 2, 1863.

13 Stats., 667.
Ratified Mar. 1, 1864.
Proclaimed May 5, 1864.

Articles of a treaty made and concluded at the Old Crossing of Red Lake River, in the State of Minnesota, on the second day of October, in the year eighteen hundred and sixty-three, between the United States of America, by their commissioners, Alexander Ramsey and Ashley C. Morrill, agent for the Chippewa Indians, and the Red Lake and Pembina bands of Chippewas; by their chiefs, head-men, and warriors.

Perpetual peace and friendship.

ARTICLE 1. The peace and friendship now existing between the United States and the Red Lake and Pembina bands of Chippewa Indians shall be perpetual.

Lands ceded to the United States.

ARTICLE 2. The said Red Lake and Pembina bands of Chippewa Indians do hereby cede, sell, and convey to the United States all their right, title, and interest in and to all the lands now owned and claimed by them in the State of Minnesota and in the Territory of Dakota within the following described boundaries, to wit: Beginning at the point where the international boundary between the United States and the British possessions intersects the shore of the Lake of the Woods; thence in a direct line southwesterly to the head of Thief River; thence down the main channel of said Thief River to its mouth on the Red Lake River; thence in a southeasterly direction, in a direct line toward the head of Wild Rice River, to the point where such line would intersect the northwestern boundary of a tract ceded to the

Boundaries.

United States by a treaty concluded at Washington on the 22nd day of February, in the year eighteen hundred and fifty-five, with the Mississippi, Pillager, and Lake Winnebigoshish bands of Chippewa Indians; thence along the said boundary-line of the said cession to the mouth of Wild Rice River; thence up the main channel of the Red River to the mouth of the Shayenne; thence up the main channel of the Shayenne River to Poplar Grove; thence in a direct line to the Place of Stumps, otherwise called Lake Chicot; thence in a direct line to the head of the main branch of the Salt River; thence in a direct line due north to the point where such line would intersect the international boundary aforesaid; thence eastwardly along said boundary to the place of beginning.

Payment for lands ceded.

ARTICLE 3. In consideration of the foregoing cession, the United States agree to pay to the said Red Lake and Pembina bands of Chippewa Indians the following sums, to wit: Twenty thousand dollars per annum for twenty years; the said sum to be distributed among the Chippewa Indians of the said bands in equal amounts per capita, and for this purpose an accurate enumeration and enrollment of the members of the respective bands and families shall be made by the officers of the United States: *Provided,* That so much of this sum as the President of the United States shall direct, not exceeding five thousand dollars per year, may be reserved from the above sum, and applied to agriculture, education, the purchase of goods, powder, lead, &c., for their use, and to such other beneficial purposes, calculated to promote the prosperity and happiness of the said Chippewa Indians, as he may prescribe.

Proviso.

Amount reserved.

Ammesty for past offenses.

ARTICLE 4. And in further consideration of the foregoing cession, and of their promise to abstain from such acts in future, the United States agree that the said Red Lake and Pembina bands of Chippewa Indians shall not be held liable to punishment for past offences. And in order to make compensation to the injured parties for the depredations committed by the said Indians on the goods of certain British and American traders at the mouth of Red Lake River, and for exactions forcibly levied by them on the proprietors of the steamboat plying on the Red River, and to enable them to pay their just debts, the United States agree to appropriate the sum of one hundred thousand dollars, it being understood and agreed that the claims of individuals for damages or debt under this article shall be ascertained and audited. In consultation with the chiefs of said bands, by a commissioner or commissioners appointed by the President of the United States; furthermore, the sum of two thousand dollars shall be expended for powder, lead, twine, or such other beneficial purposes as the chiefs may request, to be equitably distributed among the said bands at the first payment: *Provided,* That no part of the sum of one hundred thousand dollars shall be appropriated or paid to make compensation for damages or for the payment of any debts owing from said Indians until the said commissioner or commissioners shall report each case, with the proofs thereof, to the Secretary of the Interior, to be submitted to Congress, with his opinion thereon, for its action; and that, after such damages and debts shall have been paid, the residue of said sum shall be added to the annuity funds of said Indians, to be divided equally upon said annuities.

Appropriation for former depredations.

Claims, how to be audited.

Appropriation for powder, lead, etc.

Appropriation to encourage the adoption of habits of civilized life.

ARTICLE 5. To encourage and aid the chiefs of said bands in preserving order and inducing, by their example and advice, the members of their respective bands to adopt the habits and pursuits of civilized life, there shall be paid to each of the said chiefs annually, out of the annuities of the said bands, a sum not exceeding one hundred and fifty dollars, to be determined by their agents according to their respective merits. And for the better promotion of the above objects, a further sum of five hundred dollars shall be paid at the first payment to each of the said chiefs to enable him to build for himself a house. Also, the sum of five thousand dollars shall be appropriated by the United States for cutting out a road from Leach Lake to Red Lake.

For road from Leach Lake to Red Lake.

Board of visitors, their appointment; duty, pay.

ARTICLE 6. The President shall appoint a board of visitors, to consist of not less than two or more than three persons, to be selected from such Christian denominations as he may designate, whose duty it shall be to attend at all annuity payments of said Chippewa Indians, to inspect their field and other improvements, and to report annually thereon on or before the first day of November, and also as to the qualifications and moral deportment of all persons residing upon the reservation under the authority of law; and they shall receive for their services five dollars a day for the time actually employed, and ten cents per mile for travelling expenses: *Provided,* That no one shall be paid in any one year for more than twenty days' service or for more than three hundred miles' travel.

Spirituous liquors prohibited.

ARTICLE 7. The laws of the United States now in force, or that may hereafter be enacted,

prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect throughout the country hereby ceded, until otherwise directed by Congress or the President of the United States.

Grant of 160 acres of land to certain of these Indians.

ARTICLE 8. In further consideration of the foregoing cession, it is hereby agreed that the United States shall grant to each male adult half-breed or mixed-blood who is related by blood to the said Chippewas of the said Red Lake or Pembina bands who has adopted the habits and customs of civilized life, and who is a citizen of the United States, a homestead of one hundred and sixty acres of land, to be selected at his option, within the limits of the tract of country hereby ceded to the United States, on any land not previously occupied by actual settlers or covered by prior grants, the boundaries thereof to be adjusted in conformity with the lines of the official surveys when the same shall be made, and with the laws and regulations of the United States affecting the location and entry of the same: *Provided,* That no scrip shall be issued under the provisions of this article, and no assignments shall be made of any right, title, or interest at law or in equity until a patent shall issue, and no patent shall be issued until due proof of five years' actual residence and cultivation, as required by the act entitled "An act to secure homesteads on the public domain."

Reservations of 640 acres each for the chiefs Moose Dung and Red Bear.

ARTICLE 9. Upon the urgent request of the Indians, parties to this treaty, there shall be set apart from the tract hereby ceded a reservation of (640) six hundred and forty acres near the mouth of Thief River for the chief "Moose Dung," and a like reservation of (640) six hundred and forty acres for the chief "Red Bear," on the north side of Pembina River.

In witness whereof, the said Alexander Ramsey and Ashley C. Morrill, commissioners on the part of the United States, and the chiefs, headmen, and warriors of the Red Lake and Pembina bands of Chippewa Indians, have hereunto set their hands, at the Old Crossing of Red Lake River, in the State of Minnesota, this second day of October, in the year of our Lord one thousand eight hundred and sixty-three.

Supreme Court, U. S.
FILED
JUL 8 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1713

RED LAKE BAND OF CHIPPEWA INDIANS,
Petitioner,

v.

STATE OF MINNESOTA and COUNTIES OF ROSEAU, PENNINGTON, MARSHALL, RED LAKE, POLK, CLEARWATER, BELTRAMI, LAKE OF THE WOODS, and KOOCHICHING,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE STATE OF SOUTH DAKOTA, *ET AL.*, AS AMICI CURIAE IN SUPPORT OF PETITION

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(Other States Joining Set Forth on Inside Cover)

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Certain other interested States did not have an opportunity to fully examine the merits of the question presented prior to the printing of this Brief. The Office of the Clerk will be advised directly if those States elect to join in the views expressed herein.

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BRIEF FOR THE STATE OF SOUTH DAKOTA, *ET AL.*, AS AMICI CURIAE IN SUPPORT OF PETITION

INTEREST OF AMICI CURIAE

The State of South Dakota and the other States joining herein have a general interest in the manner in which any question of Federal Indian Law is resolved. With respect to the instant case, the issue of reservation status is of particular importance to those States containing historic reservation areas, such as certain Amici States here, since the resolution of this

issue can significantly affect the extent to which the States may exercise jurisdiction within those areas. Thus, the principles, guidelines and methods of analysis used by the courts in resolving questions of reservation status are of paramount concern to the States joining in this Brief.

ARGUMENT

The Amici States concur in the arguments advanced by the Respondent Counties in their Memorandum, and share their concern that there is presently a conflict between state and federal courts regarding the interpretation of the Nelson Act, 25 Stat. 642 (1889), which typifies the reservation cession acts of this period. In its decision below, the Court of Appeals stated only its conclusion that the Nelson Act had the effect of diminishing the boundaries of the Red Lake Reservation. 614 F.2d at 1162. While the Amici States concur in the result, they are concerned by the fact that the court neither stated the rationale for its conclusion nor attempted to distinguish the several state and federal court decisions which have reached the opposite conclusion concerning the effect of the Act on other reservation areas similarly treated under the Act. *See Leech Lake Band of Chippewa Indians* v. *Herbst,* 334 F. Supp. 1001 (D. Minn. 1971); *State* v. *Clark,* 282 N.W.2d 902 (Minn. 1979), *cert. denied,* ____ U.S. ____, 100 S.Ct. 1080 (1980); *State* v. *Forge,* 262 N.W.2d 341 (Minn. 1977), *appeal dismissed,* 435 U.S. 919 (1978). The failure of the court below to articulate its reasoning or to discuss the highly relevant decisions of *DeCoteau* v. *District County Court,* 420 U.S. 425 (1975) and *Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584 (1977) is hardly in keeping with the analytical guidelines set forth by this Court in the latter decisions.

Moreover, the Eighth Circuit's treatment of the instant case is indicative of its inconsistent approach to the question of the disestablishment of Indian reservations or portions thereof.

Compare, e.g., United States ex rel. Cook v. *Parkinson,* 525 F.2d 120 (8th Cir. 1975), *cert. denied,* 430 U.S. 982 (1977); and *Rosebud Sioux Tribe* v. *Kneip,* 521 F.2d 87 (8th Cir. 1975), *aff'd,* 430 U.S. 584 (1977); *with United States* v. *Dupris,* 612 F.2d 319 (8th Cir. 1979), *vacated mem.,* ____ U.S. ____, 48 U.S.L.W. 3785 (June 2, 1980); and *United States* v. *Long Elk,* 565 F.2d 1032 (8th Cir. 1977). While this question must to some extent be considered on a case-by-case basis, the Eighth Circuit's inconsistent treatment underscores the need for a "well-defined body of principles." *Washington* v. *Confederated Tribes,* ____ U.S. ____, 48 U.S.L.W. 4668, 4679 (June 2, 1980) (Rehnquist, J., concurring and dissenting). These principles have been clearly stated by this Court, but it is apparent that they need to be re-emphasized in order to avoid erosion by the seemingly arbitrary approach of certain of the lower courts.

The failure of the Court of Appeals to adequately explain its decision below exacerbates the conflict resulting from that decision. This conflict creates confusion as to the proper application of the principles stated by this Court in *Rosebud Sioux Tribe* v. *Kneip, supra* and *DeCoteau* v. *District County Court, supra,* and therefore serves to undermine those principles. For this reason, the Amici States support the position of the Respondent Counties that certiorari be granted in order to resolve the conflict regarding the important questions presented by this case.

CONCLUSION

For the foregoing reasons, the Amici Curiae urge that certiorari be granted.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MEMORANDUM OF RESPONDENT COUNTIES CONCURRING IN THE SUGGESTION THAT CERTIORARI BE GRANTED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1713

RED LAKE BAND OF CHIPPEWA INDIANS,

Petitioner,

v.

STATE OF MINNESOTA AND COUNTIES OF ROSEAU, PENNINGTON, MARSHALL, RED LAKE, POLK, CLEARWATER, BELTRAMI, LAKE OF THE WOODS, AND KOOCHICHING,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MEMORANDUM OF RESPONDENT COUNTIES CONCURRING IN THE SUGGESTION THAT CERTIORARI BE GRANTED

The Counties of Roseau, Pennington, Marshall, Red Lake, Polk, Clearwater, Beltrami, Lake of the Woods, and Koochiching, Minnesota, while opposing the position taken by the petitioners, respectfully concur in the suggestion that certiorari be granted.

QUESTION PRESENTED

Whether the Red Lake Band of Chippewa Indians, following cessions of land in 1889 and 1904, retain the right to hunt and fish free of state and county regulation in the territory ceded.

STATEMENT OF THE CASE

The 1863 boundaries of the Red Lake Reservation encompass a significant portion of the territory of each of the nine respondent Counties. The respondent Counties otherwise adopt the Statement of the Case set forth in the Brief of the State of Minnesota in opposition to the Petition.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS CLEARLY CORRECT IN LIGHT OF THE RECENT DECISIONS OF THIS COURT.

As grounds for its claim of hunting and fishing rights in the area in question, the Red Lake Band argues in its Petition that the Red Lake Reservation extends to its original 1863 boundaries despite the cession Acts of 1889 and 1904, and that the decisions of the courts below are in conflict with the recent decisions of this Court in *DeCoteau* v. *District County Court,* 420 U.S. 425 (1975) and *Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584 (1977). *See* Petition at 12-14. This claim is unfounded, however, since an examination of the 1889 and 1904 Acts in light of *Rosebud* and *DeCoteau* actually leads to the unavoidable conclusion that the Acts had the effect of disestablishing the areas that were opened to settlement by those Acts.

It is well settled that in determining questions of the disestablishment of Indian reservations or portions thereof by congressional action, the intent of Congress controls. *Rosebud,*

supra at 586; *DeCoteau, supra* at 442, 444. The analysis to be used in determining congressional intent involves an examination of several factors: the face of the act in question, its legislative history and surrounding circumstances, and the subsequent jurisdictional history. *Rosebud, supra* at 587, 603; *DeCoteau, supra* at 442, 444. Such an inquiry, when applied to the question at hand, clearly reveals a congressional intent to disestablish the areas opened to settlement by the 1889 and 1904 Acts.

The face of the Act of January 14, 1889, 25 Stat. 642 (known as the Nelson Act), clearly indicates an underlying purpose to disestablish the lands to be ceded under the Act:

> That the President of the United States is hereby authorized and directed . . . to designate and appoint three Commissioners, whose duty it shall be . . . to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota *for the complete cession and relinquishment in writing of all their title and interest in and to* all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations and to *all and so much of these two reservations as in the judgment of said Commission is not required to make and fill the allotments* required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes. . . .

§ 1, Act of January 14, 1889, 25 Stat. 642 (emphasis added). Substantially identical words of cession have been held to be "precisely suited" to disestablishment. *Rosebud, supra* at 597; *DeCoteau, supra* at 445. In keeping with the mandate of the Nelson Act, the agreement made with the Band pursuant to the Act stated that the Indians "do hereby grant, cede, relinquish, and convey to the United States all our right, title and interest in" the agreed-upon area. H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. at 28 (1890).

The Act of February 20, 1904, 33 Stat. 46, contained language virtually identical to that contained in the 1889 Act:

> The said Indians belonging on the Red Lake Indian Reservation, Minnesota, for the consideration hereinafter named, *do hereby cede, surrender, grant, and convey* to the United States *all their claim, right, title and interest in and to* all that part of the Red Lake Indian Reservation situate within the boundaries of Red Lake County, Minnesota. . . .

Act of February 20, 1904, 33 Stat. 46 (emphasis added). These words of cession are exactly the same as those held by this Court in *Rosebud* to be "precisely suited" to disestablishment. *Rosebud, supra* at 592, 597. In addition, the Act expressly refers to the unceded area as the "diminished reservation." 33 Stat. at 48.

The Band attempts to distinguish the statutes at hand from those considered in *Rosebud* and *DeCoteau* by noting that the Nelson Act and the 1904 Red Lake Act did not provide for a sum certain payment to the Indians but instead provided that the Indians would be paid when the lands were actually sold to homesteaders. However, this fact is not particularly relevant to the question of disestablishment. All of the statutes construed in *Rosebud* contained payment schemes like those in the Acts here in question rather than the sum certain scheme present in *DeCoteau.* As this Court stated, this fact is not dispositive and did not compel a finding that the reservation areas in question were not disestablished.[1] *Rosebud, supra* at 598 & n.20.

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[1] The Band's statement that the *Rosebud* and *DeCoteau* decisions were grounded on the fact that the Indians in these cases initially entered into agreements for a lump-sum payment, *see* Petition at 12, is not accurate and conflicts with the Court's own analysis of those decisions. *See Rosebud* at 598 n.20. In fact, neither of the 1907 and 1910 Acts interpreted in *Rosebud* originated from such an agreement, whereas the 1904 Red Lake Act actually did arise from a lump-sum cession agreement. *See* 33 Stat. at 48. In addition, the Band's reliance on the trust aspect of the cessions, *see* Petition at 14, is similarly misplaced. See *Rosebud* at 601 n.24.

An examination of the legislative history of the Acts in question and the circumstances surrounding their enactment confirms what is plain from the face of the Acts—that they were intended to disestablish the land ceded to the United States. By the Act of May 15, 1886, 24 Stat. 44, the Secretary of the Interior was authorized to negotiate with the Chippewas in Minnesota for "such change of their reservation as may be deemed desirable." Consequently, a commission was appointed by the Secretary which, as part of its duties, was to negotiate with the Red Lake Band in order to "obtain their consent to a reduction of their reservation." S. Exec. Doc. No. 115, 49th Cong., 2d Sess. at 12 (1887). In 1886, a cession agreement was reached with the Indians, *see* S. Exec. Doc. No. 115, *supra* at 22-27, but was never ratified because of objections to the method of disposition and the amount of land ceded. H.R. Rep. No. 789, 50th Cong., 1st Sess. at 5 (1888). Instead, Congress in 1889 enacted the Nelson Act, which provided for the cession of all land not needed for allotment on a number of Minnesota reservations, including the Red Lake Reservation.

Pursuant to the Nelson Act, a commission was appointed in 1889 which met with the Red Lake Band that same year. H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. at 66-85 (1890). An agreement was reached defining the area not needed for allotment and, as required by Section 1 of the Nelson Act, the President approved the agreement on March 4, 1890. *Id.* at 1-2.

An examination of the legislative history and attendant circumstances of the 1904 Act reveals the same congressional intent to disestablish the affected portion of the Reservation. In 1902, responding to the requests of a local mayor and the Minnesota congressional delegation, the Secretary of the Interior instructed the Commissioner of Indian Affairs to send Indian Inspector James McLaughlin, who had recently concluded the 1901 agreement with the Rosebud Sioux Indians (*see Rosebud* at 590-91), to negotiate with the Red Lake Indians for the cession of the western portion of their Reservation. *See* Letter

of E.A. Hitchcock, Secretary of the Interior, to Commissioner of Indian Affairs (February 10, 1902). Soon afterwards negotiations were entered into between Inspector McLaughlin and the Indians concerning the reduction of the Reservation and the establishment of boundaries for a new diminished reservation. *Chippewas of Minnesota,* Hearings Before the Comm. on Indian Affairs, House of Representatives, 66th Cong., 2d Sess. at 196-227 (1920). On March 10, 1902, the Indians and Inspector McLaughlin entered into an agreement for the cession and relinquishment of the western portion of the Reservation. The operative language in Article I of the Agreement, which is reproduced in the 1904 Act, is precisely the same as that of the 1901 Rosebud agreement held by this Court to have had the "unmistakable baseline purpose of disestablishment." *Rosebud, supra* at 592.

Like the 1901 Rosebud agreement, *Rosebud, supra* at 591 & n.10, the 1902 Red Lake agreement met with opposition in the same Congress because of the lump-sum payment provision. *Chippewas of Minnesota, supra* at 244; 38 Cong. Rec. 1899 (1904). Consequently, Congress passed the Act of February 20, 1904, which amended the 1902 agreement to provide for payment upon actual sale to homesteaders. As in *Rosebud, supra* at 598, "[t]here is nothing in the changed method of payment . . . which indicates that the clear intent of the . . . Agreement to diminish the Reservation boundaries had changed" between 1902 and 1904.

The jurisdictional history of the area in question subsequent to the passage of the 1889 and 1904 Acts is further evidence of the disestablishment purpose of these Acts. Significantly, the United States has never asserted that the Red Lake Reservation extends to its original boundaries,[2] and has never sought to administer the ceded, non-restored areas as part of the Reservation, but instead has consistently recognized that the reservation area was diminished by the 1889 and 1904 Acts.

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[2] Nor did it do so in the instant litigation, which it initiated.

See United States v. *Minnesota,* 446 F. Supp. 1382, 1388 (D. Minn. 1979). The repeated indications of this understanding on the part of the federal government are legion and are too numerous to list in this discussion. *See* Post-Trial Brief of Intervening Defendant Counties, *United States* v. *Minnesota, supra* at 57-92. Both the contemporaneous administrative interpretion of the Acts and the consistent, longstanding understanding of government officials are entitled to great weight. *See, e.g., Andrus* v. *Shell Oil Co.,* ____ U.S. ____, 48 U.S.L.W. 4603, 4606 (1980). *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694, 718-19 (1975); *Zuber* v. *Allen,* 396 U.S. 168, 192 (1969); *Leary* v. *United States,* 395 U.S. 6, 25 (1969).

The State of Minnesota, on the other hand, while it has recognized the limitations on its jurisdiction within the Diminished Reservation and restored areas, *see* Brief of State at 4, has consistently exercised full jurisdiction over Indians and non-Indians alike in the ceded, unrestored areas. *Red Lake Band of Chippewa Indians* v. *Minnesota,* 614 F.2d 1161, 1162 (1980); *United States* v. *Minnesota, supra* at 1388. As was stated in *Rosebud, supra* at 605, the "long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian . . . not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges."

Subsequent congressional treatment also confirms that the intent of Congress was to alter the original boundaries of the Red Lake Reservation. A number of subsequent statutes refer to the Reservation as "diminished" or to the ceded lands as being "formerly" within the Reservation. *See* Act of March 1, 1899, 30 Stat. 924, 929; Act of April 17, 1900, 31 Stat. 134, 134, 135; Act of February 8, 1905, 33 Stat. 708, 709; Act of February 16, 1911, 36 Stat. 913: Act of June 30, 1913, 38 Stat. 77, 88; Act of February 14, 1931, 46 Stat. 1102. These numerous congressional references to the status of the Red Lake Reservation

merit consideration in determining earlier congressional intent. *See Rosebud, supra* at 603 n.25; *Mattz* v. *Arnett,* 412 U.S. 481, 505 n.25 (1973).

Furthermore, decisions of this Court and other courts have consistently characterized the 1889 and 1904 Acts as having diminished the size of the Red Lake Reservation. *See e.g., Johnson* v. *Gearlds,* 234 U.S. 422, 443 (1914); *Chippewa Indians of Minnesota* v. *United States,* 80 Ct. Cl. 410, 477-78, 480-81 (1935), *aff'd,* 301 U.S. 358 (1937). In addition, the land ceded pursuant to the Nelson Act has been described as having been "formerly" within the Red Lake Reservation. *See United States* v. *Holt State Bank,* 270 U.S. 49, 52 (1926); *Chippewa Indians of Minnesota* v. *United States,* 91 Ct. Cl. 97, 105 (1940). These decisions, while not dispositive, lend strong support to a finding of disestablishment.

The only reasonable conclusion to be reached after examining all of the available material is that the 1889 Nelson Act and the 1904 Act were plainly intended to disestablish the portions of the original Reservation ceded under the Act. The Band's assertion that the decisions of the courts below conflict with prior decisions of this Court is without merit. In fact, the opposite is clear: applying the principles stated in the recent decisions of this Court, the courts below could have reached no other conclusion. Both the operative language and the factual circumstances of the Acts at issue are virtually indistinguishable from those of the Acts construed in *Rosebud* and *DeCoteau.*

II. THE DECISION OF THE EIGHTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE MINNESOTA SUPREME COURT INTERPRETING THE NELSON ACT.

The Red Lake Band argues that certiorari should be granted to review the decision of the Court of Appeals because of a conflict with other judicial interpretations of the effect of the Nelson Act. Petition at 11-12. While it is the position of the

Respondent Counties that the instant case was correctly decided below, the Counties agree that a serious conflict exists between the State and federal courts which merits resolution by this Court.

Despite the unmistakable cession language contained in the Nelson Act, the Minnesota Supreme Court in *State* v. *Clark,* 282 N.W.2d 902 (Minn. 1979), *cert. denied,* ____ U.S. ____, 100 S.Ct. 1080 (1980), held that the Act was not intended to disestablish the 1863 White Earth Reservation. In so doing, it reaffirmed its decision in *State* v. *Forge,* 262 N.W.2d 341, 347 (Minn. 1977), *appeal dismissed,* 435 U.S. 919 (1978),[3] in which it held, with minimal discussion, that the Nelson Act was not intended to disestablish the historic Leech Lake Reservation.[4] Both of these reservation areas were affected by the same Nelson Act language providing for "cession and relinquishment" of reservation lands. All of the Leech Lake lands were

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[3] The court also relied heavily on the federal District Court decision in *Leech Lake Band of Chippewa Indians* v. *Herbst,* 334 F. Supp. 1001 (D. Minn. 1971), which held that the historic Leech Lake Reservation was not disestablished by the Nelson Act. It should be noted that the court's decision in *Leech Lake* was based primarily upon the opinion of this Court in *Seymour* v. *Superintendent,* 368 U.S. 351 (1962), the court not having had the benefit of the later *Rosebud* and *DeCoteau* decisions which interpreted statutes more closely analogous than that construed in *Seymour.* The conflict created by the Eighth Circuit's interpretation of legislative intent in the instant case necessarily results in the effective overruling of *Leech Lake.* However, in spite of the decisions in the instant case, the federal courts' treatment of the Nelson Act has itself been complicated by the conflicting state court treatment. In *White Earth Band of Chippewa Indians* v. *Herbst,* Civ. No. 3-74-63 (D. Minn., order filed May 30, 1980), the District Court has applied the principles of collateral estoppel to prevent the reconsideration in federal court of the status of the portion of the 1867 White Earth Reservation considered in *Clark.*

[4] The Court's opinion in *Forge* appears to be almost entirely based on the erroneous assumption that the taking of allotments by Indians on their historic reservation was inconsistent with reservation disestablishment. This belief is squarely at odds with this Court's decision in *DeCoteau, supra. See also Rosebud, supra.*

to be ceded under the Act, and, at White Earth, as at Red Lake, the cession was to encompass all lands not required for allotments.[5] The Minnesota court's construction of the Act's cession language is wholly inconsistent with this Court's decision in *Rosebud* and *DeCoteau,* which interpreted virtually identical language regarding the Lake Traverse and Rosebud Reservations. *See also DeCoteau, supra* at 439 nn.21 & 22, 446 (similar language in other cession agreements in same statute); *Ellis* v. *Page,* 351 F.2d 250, 251-52 (10th Cir. 1965); *Tooisgah* v. *United States,* 186 F.2d 93, 97-98 (10th Cir. 1950): *Hawkins* v. *Crist,* No. CV-76-99-BLG (D. Mont., January 27, 1978), *State* v. *Bad Horse,* 7 Indian L. Rep. 4012 (Mont. 1980).

The ruling of the Court of Appeals that the boundaries of the Red Lake Reservation "were clearly diminished" by the Nelson Act, 614 F.2d at 1162, and its affirmation of the District Court's holding that the purpose of the Act was "to restore the land to the public domain," 466 F. Supp. at 1386 n.1, 1387, are fundamentally incompatible with the Minnesota court's ruling that "congressional intent to terminate [reservation status] is lacking from the Nelson Act." *Clark, supra* at 906. This conflict creates uncertainty concerning the effect of the Nelson Act on the reservation status of the area in question, and is therefore of great concern to the Respondent Counties. The significance of this question to the counties goes far beyond the issue of state

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[5] Under the principles stated in *DeCoteau,* which involved similar circumstances, it must be concluded that the underlying purpose of the cession was to disestablish the entire White Earth Reservation, including the area set aside for allotments. While this analysis would seem to apply equally to the Red Lake Reservation, other circumstances support a conclusion that the Red Lake Reservation was merely diminished by the Nelson Act cession and not totally disestablished. First, the unceded portion of the Reservation was never allotted, *e.g., Chippewa Indians of Minnesota* v. *United States,* 90 Ct. Cl. 140, 144 (1940), unlike the White Earth Reservation, and the process contemplated by the Nelson Act was therefore never completed. Secondly, the 1904 cession Act expressly recognizes the area retained by the Red Lake Indians as the "diminished reservation."

and county jurisdiction over Indian hunting and fishing on non-trust lands within the confines of the historic reservation. If the Nelson Act is interpreted not to have had the purpose of disestablishment, then the degree of jurisdiction which the State and Counties can exercise in the ceded portions of the original Red Lake Reservation is severely limited. *See, e.g., DeCoteau, supra* at 427 n.2.[6] Moreover, portions of other historic reservation areas affected by the Nelson Act are contained within the boundaries of three of the Respondent Counties: Clearwater (White Earth), Beltrami (Leech Lake), and Koochiching (Nett Lake). Therefore, because of the great importance to the Counties of the issues presented by this case, the Counties ask that certiorari be granted in order to resolve the conflict between State and federal courts. *See DeCoteau, supra* at 430-31.

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[6] Public Law 280, which extends some types of State jurisdiction into Indian country in Minnesota, does not apply to the Red Lake Reservation. 18 U.S.C. § 1162; 28 U.S.C. § 1360.

CONCLUSION

For the foregoing reasons, the Respondent Counties respectfully suggest that certiorari be granted.

Respectfully submitted,

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IN THE

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RED LAKE BAND OF CHIPPEWA INDIANS,
Petitioner,

vs.

STATE OF MINNESOTA and COUNTIES OF ROSEAU, PENNINGTON, MARSHALL, RED LAKE, POLK, CLEARWATER, BELTRAMI, LAKE OF THE WOODS, and KOOCHICHING,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT STATE OF MINNESOTA IN OPPOSITION TO PETITION FOR CERTIORARI

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT STATE OF MINNESOTA IN OPPOSITION TO PETITION FOR CERTIORARI

The respondent State of Minnesota respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case.

QUESTION PRESENTED

After the Red Lake Band of Chippewa Indians ceded territory to the United States in 1889 and 1904, did any special Indian hunting and fishing rights survive in the ceded land?

STATEMENT OF THE CASE

In this action the Red Lake Band of Chippewa Indians sought to enjoin the State of Minnesota from enforcing its game and fish laws against members of the Band within an area of approximately 2.6 million acres *outside* the boundaries of what is recognized as the present Red Lake Indian Reservation.[1] The action was tried before the United States District Court on the basis of a very extensive set of stipulated documents and facts. Chief Judge Edward J. Devitt issued an opinion on March 28, 1979 (466 F. Supp. 1382) in which he determined that the land in question had been fully and completely ceded to the United States, and that no special hunting or fishing rights remained thereon. The United States Court of Appeals for the Eighth Circuit affirmed *per curiam* the district court judgment on January 31, 1980.[2]

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[1] The Red Lake Reservation is a contiguous block of land consisting of approximately 543,000 acres, virtually all of which is owned in trust for the Band. Additionally, certain widely scattered parcels outside the contiguous reservation were restored to reservation status pursuant to sections 3 and 7 of the Wheeler-Howard Act, 48 Stat. 984 as amended, 25 U.S.C. § 463. There are about 160,000 acres of these lands.

[2] The United States initiated this action in U.S. District Court on behalf of the Red Lake Band. Although the United States filed a notice of appeal after the district court ruling, the government later asked the court of appeals to dismiss the appeal. At that point the Red Lake Band itself asked to be substituted for the United States as appellant. The court of appeals allowed the substitution. After the United States withdrew as appellant, it did not participate any further in the case, either with written submissions or oral argument.

The land on which the Band seeks hunting and fishing rights encompasses approximately 2.6 million acres surrounding the present reservation and extending north and east to the Canadian border. The land in dispute is that land which was ceded by the Red Lake Band to the United States in 1889 and 1904. The 1889 cession took place pursuant to the so-called Nelson Act (25 Stat. 642, I Kappler 301) and involved 2.4 million acres. The 1904 cession, involving another 256,000 acres, was accomplished by an Act of Congress of February 20, 1904 (33 Stat. 46, II Kappler 28).

The language of cession was virtually identical in both cession documents. The 1889 Agreement with the Red Lake Band states that the Indians "*do hereby grant, cede, relinquish and convey to the United States all our right, title, and interest in and to. . . .*" the 2.4 million acres (emphasis added). The 1904 Act states that the Indians "*do hereby cede, surrender, grant and convey to the United States all their claim, right, title, and interest in and to . . .*" the 256,000 acres (emphasis added).

After these two cessions the Band retained a contiguous block of approximately 543,000 acres, the land that is currently considered to be the Diminished Red Lake Reservation.[3] There was no provision in either cession document which preserved hunting and fishing rights in any form in the ceded land; indeed, no mention was made at all to hunting and fishing.

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[3] As mentioned in n. 1, *supra*, an additional 160,000 acres of widely scattered parcels outside the Diminished Reservation were returned to reservation status under the terms of the Wheeler-Howard Act, 48 Stat. 984 as amended, 25 U.S.C. § 463.

There is no controversy in this case about the ability of Band members to hunt and fish free of state game laws on either the Diminished Reservation or the lands restored to reservation status pursuant to sections 3 and 7 of the Wheeler-Howard Act. The State of Minnesota has long agreed that in those areas Band members may hunt and fish free of state regulation.

The controversy in this case focuses rather on a huge area (the 2.6 million acres ceded in 1889 and 1904) *in addition* to the 543,000 acre Diminished Reservation and 160,000 acres of restored lands on which the State already recognizes Band hunting and fishing rights. The area in which hunting and fishing rights are now sought by the Band currently is overwhelmingly non-Indian in population and character,[4] in sharp contrast to the situation within the Diminished Reservation.[5]

Additionally, it is not disputed that since the 1889 and 1904 cessions the State has exercised full jurisdiction over Indians in the ceded territory (except on the Wheeler-Howard lands). Until the present litigation was started, the United States itself acknowledged and acquiesced to the State's exercise of jurisdiction.

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[4] The non-Indian population in the areas ceded in 1889 and 1904 is 17,700; the Indian population is 170. The lands restored under the Wheeler-Howard Act constitute only 6.2% of the ceded area; the remaining land is owned in fee by individuals, by the State, and even by the federal government free from any trust in favor of the Indians.

[5] The Diminished Reservation has a population of 2,800 Indians and 200 non-Indians. The land is almost entirely owned in common by the Red Lake Band.

REASONS FOR DENYING THE WRIT

I. THE DECISIONS OF THE DISTRICT COURT AND COURT OF APPEALS ACCURATELY REFLECT THE FACTUAL CIRCUMSTANCES SURROUNDING THE RED LAKE CESSIONS, AND IT IS POSSIBLE TO RECONCILE THE DECISIONS WITH OTHER DECISIONS IN THE FEDERAL DISTRICT COURT AND MINNESOTA SUPREME COURT RELATING TO OTHER RESERVATIONS.

The decisions of the district court and court of appeals in the case were made on the basis of a voluminous set of exhibits, a comprehensive factual stipulation, and extensive briefing. The courts followed the dictates of this Court for interpreting treaties and agreements. The district court's analysis closely followed its own preliminary statement that:

> To determine the intent of Congress and understanding of the Indians, the court must analyze the wording of the treaties, agreements, and enactments, the prior history, the surrounding circumstances, and the subsequent construction given those documents by the parties.

United States v. Minnesota, 466 F. Supp. 1382, 1385 (1979). The Red Lake Band made no attempt to show in the court of appeals, and makes no allegation in its petition for certiorari, that the detailed factual and historical analysis of the district court was in error.

Rather, the Band argues that the courts' treatment in this case of the effects of the 1889 and 1904 cessions was inconsistent with three other federal and state court cases dealing with other agreements in other reservations: *State of Minnesota v. Clark*, 282 N.W.2d 902 (Minn. 1979) *cert. den.* —— U.S.

——, 100 S.Ct. 1080 (1980); *State of Minnesota v. Forge*, 262 N.W.2d 341 (Minn. 1978), *appeal dismissed* 435 U.S. 919 (1978); and *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (D. Minn. 1971). This argument is not a valid basis for granting certiorari for two basic reasons. First, the cases cited by petitioner are not factually identical to the Red Lake case. Secondly, it is possible to reconcile those cases with the present decisions.

It is fundamental that every treaty or agreement has to be analyzed on its own particular facts. The Red Lake facts are not identical to those relating to the White Earth Band (addressed in *State of Minnesota v. Clark*) and the Leech Lake Band (addressed in *Leech Lake Band of Chippewa Indians v. Herbst* and *State of Minnesota v. Forge*). In the absence of a showing that the analysis of the lower courts in the present case is in error, the unexplained citations to earlier unrelated cases are of little weight.

Additionally, with regard to the *Clark* case (and therefore *Forge*, on which *Clark* relied), the Minnesota Supreme Court's ruling regarding the effect and intent of the Nelson Act can be reconciled (although not without some ambiguity) with the decision in the present Red Lake cession case. The issue in the *Clark* case involved a Nelson Act agreement which provided for the outright cession of four townships of land, but *reserved from the cession thirty-two other townships for the sole purpose of making allotments*. The hunting and fishing violations in *Clark* all took place within the thirty-two townships reserved for allotments. The Minnesota Supreme Court decided that the intent of the Nelson Act was not to disestablish those thirty-two townships as a reservation. The State of Minnesota disagrees with that decision, but nevertheless that is the present opinion of the court.

However, the Minnesota Supreme Court did not rule on the effect of the outright cession of four townships in the Nelson Act agreement.[6] In fact, in its opinion the Minnesota Supreme Court implied that it would interpret the Nelson Act differently with regard to territory ceded outright. In this context the court actually cited with approval Chief Judge Devitt's analysis in the present case relating to outright land cessions and the loss of hunting and fishing rights.[7]

It is true that the Minnesota Supreme Court in its opinion (as well as in the prior opinion of *State of Minnesota v. Forge*, 262 N.W.2d 341 (Minn. 1977) which the court found controlling) made some general statements about the intent of the Nelson Act, at least as it related to the termination of the entire White Earth and Leech Lake Reservations. The State believes the statements to be in error. It is precisely because of the court's general statements, and the confusion they could create, that the State of Minnesota sought certiorari in the *Clark* case. This Court, however, decided not to grant certiorari there, and certiorari was denied February 25, 1980, *State of Minnesota v. Clark*, —— U.S. ——, 100 S.Ct. 1080. Although the State still believes the confusion created by the

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[6] The court stated: "Also pursuant to the Nelson Act, the Indians ceded outright four townships containing valuable pine preserves to the United States. Our decision in this case applies only to land lying within the 32 townships of the White Earth Indian Reservation remaining after the 1889 cession. The other four indicated townships are therefore not significant to this decision." 282 N.W.2d at 906, n. 13.

[7] The court referred to an 1855 treaty with the Chippewas in which the Indians had agreed to "cede, sell, and convey to the United States all their right, title, and interest in and to" certain lands. The court said: "As recognized by Judge Devitt in *United States v. Minnesota, supra*, this language of cession abrogates all aboriginal hunting and fishing rights. Nor have the Chippewas advanced a claim that they were orally promised continued hunting and fishing rights in the ceded area. *See, United States v. Minnesota, supra.* Thus, we necessarily conclude that the 1855 treaty extinguished their aboriginal hunting and fishing rights in the area in question." 282 N.W.2d at 908, n. 16.

Clark decision to be troublesome, if certiorari was not granted in *Clark*, it should not be granted here. It is possible to reconcile the *Clark* holding with the holding in the present case, if *Clark* is construed narrowly as only interpreting the intent of the Nelson Act as it related to thirty-two townships of land on the White Earth Reservation.

The Red Lake Band also urges that certiorari be granted on the basis of a conflict with *Leech Lake Band of Indians v. Herbst*, 334 F. Supp. 1001 (D. Minn. 1971). Conflict with a district court decision issued almost nine years earlier is hardly grounds for granting certiorari. Additionally, as in the case of *Clark* and the White Earth Reservation, the facts of *Leech Lake* are not the same as the facts in *Red Lake*. Furthermore, *Leech Lake* was decided by the same judge, Chief Judge Devitt, who decided the present case. Apparently, either Judge Devitt found no conflict between his own reasoning in the two cases, or he felt that additional intervening supreme court precedents such as *Rosebud*[8] and *DeCoteau*[9] required a different result. In either case, *Leech Lake* provides no basis for the granting of certiorari here.

In summary, the decisions in *Clark*, *Forge* and *Leech Lake* do not justify the granting of certiorari in this case. There may be ambiguities in the *dicta* of various courts which have tried to generalize about the Nelson Act, but those ambiguities do not necessarily require the granting of certiorari. If they did not require the granting of certiorari in *State of Minnesota v. Clark*, —— U.S. ——, 100 S.Ct. 1080 (1980), they do not justify the granting of certiorari in this case.

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[8] *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 485 (1977).
[9] *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

II. THE DECISIONS OF THE DISTRICT COURT AND COURT OF APPEALS ARE CONSISTENT WITH THE RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT.

Although the Red Lake Band alleges a conflict with this Court's opinions in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) and *DeCoteau v. District County Court*, 420 U.S. 425 (1975), it is apparent from reading the district court opinion that such a conflict does not exist. The *Rosebud* and *DeCoteau* cases in particular are cited, discussed, and relied upon by the district court. The *Rosebud* decision is especially analogous to the Red Lake situation. The Band's argument that its reservation was not diminished in 1889 and 1904 because the method of payment to the Band for ceded land was not a sum certain,[10] flies directly in the face of the *Rosebud* decision. There this Court held that agreements by which ceded land was sold and the money turned over to the Indians could diminish or disestablish reservations in the same manner as sum-certain cession agreements. *See* 430 U.S. at 587-588, 592-598.

The Red Lake Band's attempt to create a conflict with controlling Supreme Court precedent does not withstand scrutiny.

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[10] Lands were to be sold by the United States and the proceeds turned over to the Band.

CONCLUSION

The decision of the district court in this matter, as affirmed *per curium* by the court of appeals, was correctly made. It does not conflict with precedent from this Court, but rather is fully consistent with that precedent. The decision can also be interpreted in a manner which is reconcilable with state court decisions and other lower federal court decisions on similar, but not analogous, subject matter. Therefore, certiorari should be denied.

Dated: May, 1980.

Respectfully submitted,

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